No. 93- _____

Supreme Court, U.S.
FILED

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Supreme Court of the United States

October Term, 1993

THE RENT STABILIZATION ASSOCIATION OF NEW YORK CITY, INC., THE DELANO VILLAGE COMPANIES, RIVERDALE GARDENS, COLISEUM PARK APARTMENTS CO., and SMALL PROPERTY OWNERS OF NEW YORK,

Petitioners,

-against-

RICHARD L. HIGGINS, Commissioner of the New York State Division of Housing and Community Renewal, ROBERT WELLS, EVERETT QUINTON, GAY MEN'S HEALTH CRISIS, INC., JANET GOODMAN, KAIROS RENCHER, and DISABLED IN ACTION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

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Printed on Recycled Paper (4242)

89 pp

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QUESTION PRESENTED FOR REVIEW

Under New York State law, rent controlled and rent stabilized apartments have, in limited respects, been subject to succession rules, under which certain defined family members can take over an apartment when the original tenant dies or vacates the unit. In 1989, the State agency which administers this program, vastly expanded the succession to tenancy rules; redefining family members beyond a discrete set of blood and spousal relatives to include persons having a financial and emotional relationship with the tenant. The State's reasons for this redefinition, which significantly reduced the ability of landlords to choose new tenants and to recover vacated apartments, included increasing homelessness, poverty and AIDS. Utilizing an unjustifiably lenient standard of review to judge whether these new rules actually advanced the agency's objectives (in conflict with this Court's decisions) and totally ignoring the fact that landlords bearing the brunt of these rules are not responsible for the problems that they allegedly address, the New York Court of Appeals ruled that these new rules did not constitute a taking of property.

The question presented for review is whether the new succession rules do, in fact, constitute a taking of property, either by regulation or by physical occupation, under the Fifth and Fourteenth Amendments of the United States Constitution.

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to this proceeding. Commissioner Richard L. Higgins has, during the course of this litigation, been succeeded as Commissioner for DHCR; first by Angelo I. Aponte, and, more recently, by Donald M. Halperin.

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In The

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THE RENT STABILIZATION ASSOCIATION OF NEW YORK CITY, INC., *et al.*,

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-against-

RICHARD L. HIGGINS, Commissioner of the New York State Division of Housing and Community Renewal, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

OPINIONS BY THE COURT BELOW

The opinion of the New York State Court of Appeals was issued on December 21, 1993 and is reprinted in the appendix to this petition (App.) at App. A, 1a - 17a. The relevant opinions of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, are reported at 189 A.D.2d 594 (A.D. 1st Dep't 1993) and 164 A.D.2d 283 (A.D. 1st Dep't 1990) and are reprinted in the appendix at App. B & C respectively, 18a - 37a. The opinion of the New York State Supreme Court (Santaella, J.) entered November 27, 1991 is reprinted in the appendix at App. D, 38a - 46a.

JURISDICTION

The decision of the New York State Court of Appeals was issued on December 21, 1993. App. A, 1a - 17a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS AT ISSUE

The Federal Constitutional provisions at issue in this matter are the Fifth and Fourteenth Amendments to the United States Constitution. The Fifth Amendment provides, in pertinent part: "[N]or shall private property be taken for public use without just compensation." The Fourteenth Amendment provides in pertinent part: "[N]or shall any state deprive any person of life, liberty or property, without due process of law."

The statutes, regulations and codes at issue are the New York City Rent Stabilization Code, 9 N.Y.C.R.R. §§ 2520.6(o) and 2523.5(b) and (e) (McKinneys Unconsol. Laws 1987, Supp. 1993); Emergency Tenant Protection Regulations ("ETPR"), 9 N.Y.C.R.R. §§ 2500.2(m) and 2503.5(d) and (e) (McKinneys Unconsol. Laws 1987, Supp. 1993); New York City Rent and Eviction Regulations ("Rent Control"), 9 N.Y.C.R.R. § 2204.6(d) (McKinneys Unconsol. Laws 1987, Supp. 1993); and the New York State Rent and Eviction Regulations, 9 N.Y.C.R.R. § 2104.6(d) (McKinneys Unconsol. Laws 1987, Supp. 1993).

The provisions of the New York City Rent Stabilization Law, Emergency Tenant Protection Regulations, New York State Rent and Eviction Regulations and New York City Rent Stabilization Code which are challenged are

reprinted in the Joint Record on Appeal below at Vol. I, p. 119 - 172, Vol. III, p. 1080 - 1093.

Under the pre-amended New York City Rent Stabilization Code, when a tenant vacated a stabilized apartment, a family member (limited to specified blood relatives and spouse) could obtain a renewal lease only if he/she had resided in the unit as a primary resident from the inception of the tenancy or commencement of the relationship, (*e.g.*, since the date of marriage, birth, adoption, etc.). 1987 RSC § 2523.5(b)(1). If the tenant vacated due to death, a surviving family member could be entitled to a renewal lease if he/she had been residing with the tenant in the unit as a primary resident for a period of at least two years immediately prior to the death of the tenant (or one year if the family member was a senior citizen or disabled person). 1987 RSC § 2523.5(b)(2). Rent stabilization outside of New York City (*i.e.*, Nassau, Suffolk and Westchester Counties) did not have a succession provision -- only a "tenant" had the right to a renewal lease (ETPR § 2503.5), and the definition of "tenant" did *not* include family members [ETPR § 2500.2(h)]. Under New York City and New York State Rent Control, the regulatory provision limited succession to tenancy to family members in occupancy of the rent controlled housing accommodation with the tenant at the time of the tenant's death (Former 9 N.Y.C.R.R. §§ 2104.6(d), 2204.6(d)).

The four new regulatory provisions at issue (hereinafter the "New Regulations")[1] each establish two components

---

[1] These four regulatory provisions cover (a) rent control within New York City, (b) rent control outside New York City, (c) rent stabilization within New York City and (d) rent stabilization outside New York City.

for an occupant of a rent regulated apartment to be entitled to claim full rights of tenancy (although previously not occupying in a privity relationship with the landlord). First, the occupant must meet the definition of "family member." The new expanded definition of "family member" is defined as:

> (1) A husband, wife, son, daughter, stepson, stepdaughter, father, mother, step-father, step-mother, brother, sister, nephew, niece, uncle, aunt, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-law or daughter-in-law of the tenant or permanent tenant;
>
> (3) Any other person residing with the tenant or permanent tenant in the housing accommodation as a primary or principal residence, respectively, who can prove an emotional and financial commitment, an interdependence between such person and the tenant or permanent tenant. Although no single factor shall be solely determinative, evidence which is to be considered in determining whether such emotional and financial commitment and interdependence existed, may include, without limitation, such factors as listed below. In no event would evidence of a sexual relationship between such person be required or considered.
>
> (i) longevity of the relationship;
>
> (ii) sharing of or relying upon each other for payment of household or family expenses, and/or other common necessities of life;
>
> (iii) intermingling of finances as evidenced by, among other things, joint ownership or bank accounts, personal and real property, credit cards, loan obligations, sharing a household budget for purposes of receiving government

benefits, etc.;

(iv) engaging in family-type activities by jointly attending family functions, holidays and celebrations, social and recreational activities; etc.;

(v) formalizing of legal obligations, intentions, and responsibilities to each other by such means as executing wills, naming each other as executor and/or beneficiary, granting each other a power of attorney and/or conferring upon each other authority to make health care decisions each for the other, entering into a personal relationship contract, making a domestic partnership declaration, or serving as a representative payee for purposes of public benefits, etc.;

(vi) holding themselves out as family members to other family members, friends, members of the community or religious institutions, or society in general, through their words or actions;

(vii) regularly preforming family functions, such as caring for each other or each other's extended family members and/or relying upon each other for daily family services;

(viii) engaging in any other pattern of behavior, agreement, or other action which evidences the intention of creating a long term, emotionally-committed relationship.

The provisions newly defining the term "family member" appear at 9 N.Y.C.R.R. § 2520.6(o) [New York City Rent Stabilization Code], 9 N.Y.C.R.R. § 2500.2(m) [New York State Rent Stabilization ETPR], 9 N.Y.C.R.R. § 2204.6(d)(3) [New York City Rent Control] and 9 N.Y.C.R.R. § 2104.6(d)(3) [New York State Rent Control].

A "family member," as newly defined above, is entitled, pursuant to the New Regulations, to claim full rights of tenancy upon the tenant having "permanently vacated the housing accommodation" if the "family member":

> [H]as resided with the tenant in the housing accommodation as a primary residence for a period of no less than two (2) years, or with such person as a "senior citizen," or a "disabled person" ... for a period of no less than one (1) year, immediately prior to the permanent vacating of the housing accommodation by the tenant, or from the inception of the tenancy or commencement of the relationship, if for less than such periods ....

The provisions newly defining succession to tenancy for family members appear at 9 N.Y.C.R.R. § 2523.5(b) and (e) [New York City Rent Stabilization], 9 N.Y.C.R.R. § 2503.5(d) [New York State Rent Stabilization], 9 N.Y.C.R.R. § 2204.6(d) [New York City Rent Control], 9 N.Y.C.R.R. § 2104.6(d) [New York State Rent Control].

REASONS FOR GRANTING THE WRIT

This case raises a significant constitutional takings issue arising under the 5th and 14th Amendments to the United States Constitution. New York's Court of Appeals recognized that the regulations must be examined under the heightened scrutiny standard enunciated by this Court in *Nollan v. California Coastal Comm'n.*, 493 U.S. 825 (1987). However, the Court below failed to draw a close nexus between the legitimate state interests proffered by the State of New York and the manner in which, if any, said interests were substantially advanced by the regulations at

issue. An innocent class of persons is forced to bear the brunt of the costs involved in providing housing for an indefinite period of time, for third parties selected by the New State Regulations. As a result, plaintiffs' Fifth and Fourteenth Amendment rights were violated.

In the instant case, the essential nexus was not supported by empirical or demonstrable evidence. The State asserted in its Regulatory Impact Statement (and the Court below seemingly accepted at face value) that the New Regulations would have "no significant adverse fiscal impact upon private regulated parties." Record on Appeal below Vol. II, p. 456. The Court of Appeals' approval of these regulations is contrary to the holdings and standards of this Court.

Other jurisdictions have similarly required that the heightened standard of scrutiny be substantiated by more than conclusory allegation. *See, Surfside Colony v. California Coastal Commission*, 226 Cal. App. 3rd 1260 (1991), *reh'g denied*, 1991 Cal. App. LEXIS 132 (Cal. App. 4th Dist. 1991); *Batch v. Town on Chapel Hill*, 376 S.E.2d 22 (N.C. App. 1989), *rev. on other grounds*, 387 S.E.2d 655 (N.C. 1990), *cert. denied*, 496 U.S. 391 (1990); *Azul Pacifico, Inc. v. City of Los Angeles*, 948 F.2d 575, 582 - 583 (9th Cir. 1991); *Leroy Land Dev. Corp. v. Tahoe Regional Planning Agency*, 733 F. Supp. 1399, 1401 (D. Nev. 1990), *rev'd*, 939 F.2d 696 (9th Cir. 1991); *Pengilly v. Multnomah County*, 810 F. Supp. 1111, 1113 (D. Or. 1992).

Under this Court's Rule 10.1(b) and (c) the writ should be granted. New York's Court of Appeals has determined the constitutional rights of a significant body of New York's private property owners in a manner that is contrary to the holdings of this Court as well as the standards and analysis utilized by both Federal and State appellate courts.

STATEMENT OF THE CASE

A. Procedural History

On November 9, 1989 DHCR promulgated "emergency" rules substantially changing the pre-existing definition of family and tenancy succession provisions pertaining to rent regulated apartments. The regulations amended were the New York City Rent Stabilization Code, 9 N.Y.C.R.R. §§ 2520.6 and 2523.5 (McKinneys Unconsol. Laws 1987, Supp. 1993); Emergency Tenant Protection Regulations ("ETPR"), 9 N.Y.C.R.R. §§ 2500.2 and 2503.5 (McKinneys Unconsol. Laws 1987, Supp. 1993 [applying to rent stabilized apartments outside the five boroughs of the City of New York]); the New York City Rent and Eviction Regulations ("rent control"), 9 N.Y.C.R.R. § 2204.6 (McKinneys Unconsol. Laws 1987, Supp. 1993); and the New York State Rent and Eviction Regulations, 9 N.Y.C.R.R. § 2104.6 (applying to rent controlled apartments inside the City of New York) (McKinneys Unconsol. Laws 1987, Supp. 1993).

The implementation of these rules was stayed on November 13, 1989 pursuant to an order to show cause commencing a declaratory judgment action seeking to declare the rules to be, *inter alia*, a violation of the Fifth and Fourteenth Amendments to the Constitution.

The declaratory judgment action was commenced by the Rent Stabilization Association (a voluntary association which represents over 25,000 members who own, manage and/or operate over 900,000 rent regulated apartments in various counties of the State of New York), the Delano Village Companies (an owner of private property consisting of 1800 rent regulated housing accommodations), Riverdale

Gardens (an owner of private property consisting of 440 rent regulated housing accommodations) and Coliseum Park Apartments Co. (an owner of private property consisting of 275 rent regulated apartments) (Record on Appeal below pp. 53 - 55). During the litigation, the Small Property Owners of New York ("SPONY") joined as a plaintiff-intervenor. SPONY consists of approximately 1000 owners of New York City residential buildings, most of which have less than ten units. Most SPONY members and their families live in the buildings that they own. (Record on Appeal below pp. 670 - 680).

The agency's explanatory documentation accompanying the emergency rules asserted that the emergency enactment "was necessary for the preservation of the general welfare" and was needed to deal with a low apartment vacancy rate.

With respect to New York City (but *not* other parts of New York State), DHCR stated that there was a "homelessness crisis" necessitating the enactment of emergency rules. No data was offered to link homelessness to restrictions on succession to tenancy of rent regulated apartments.

DHCR also stated that the emergency rules were necessitated because of the AIDS crisis facing New York State. However, the agency offered no data creating a nexus between the disease and occupancy of rent regulated apartments. Further, the agency did not explain how tenancy succession regulations would benefit such persons or why the specific disease identified should be a basis for extending special housing rights to persons, more so than any other disease suffered by tenants of rent regulated apartments.

Finally, the agency generically identified "poverty" as a

societal problem being addressed by these emergency regulations. However, no nexus was drawn between the problem of poverty and the actual impact of the regulations. Notably, no income test was established by the regulations; thus, enabling the rich to benefit as readily as the poor.

On March 20, 1990, the "emergency" rules were adopted by DHCR as "permanent" amendments, despite the existence of a temporary restraining order which explicitly barred the effectuation and/or implementation of the rules from their inception.[2]

On December 4, 1990, on appeal by respondents, the Appellate Division, First Department, vacated the TRO (which it had *sua sponte* deemed to be a preliminary injunction) and allowed the new regulations to go in effect. The Appellate Division, First Department, held that the challenged regulations did not authorize " 'the permanent occupation of the landlord's property by a third party' of the sort, which traditionally, has been held to be a 'taking' (*see, Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440, 441)." *Rent Stabilization Association v. Higgins*, 164 A.D.2d at 297, 562 N.Y.S.2d 962 (App. Div. 1st Dep't 1990). App. C, 34a. The Appellate Division further opined that "the plaintiffs will not be able to demonstrate that the regulations do no substantially advance a legitimate state interest or that they deny landlord's economically viable use of their property" *Rent Stabilization Association v. Higgins*, 164 A.D.2d at 299. App. C, 36a.

On November 27, 1991, relying upon the Appellate

---

[2] Pursuant to plaintiffs' amended complaint, the permanent amendments were challenged as, *inter alia*, a violation of the Fifth and Fourteenth Amendments.

Division's prior December 4, 1990 opinion, the Supreme Court summarily issued a final declaratory judgment upholding the validity of the new regulations. App. D, 38a - 46a. On January 12, 1993 the Appellate Division affirmed the Supreme Court's declaratory judgment. In so holding, the Appellate Division stated that:

> Even under the heightened scrutiny applicable to regulatory takings, the regulations substantially advance a legitimate governmental interest (see, *Nollan v. California Coastal Commission*, 493 U.S. 825, 834). (App. B, 19a).

On December 21, 1993, the Court of Appeals affirmed, holding that the regulations constituted neither a physical nor a regulatory taking (App. A, 1a - 16a).

In a separate concurrence Justice Joseph Bellacosa "perceive[d] significant practical and governance concerns that merit close attention as an outgrowth of this decision" (App. A, 17a). Justice Bellacosa further stated that New York State's Legislature should "carefully assess the sweeping power it impliedly invested in this administrative agency in the execution of a unique human sheltering mission." Justice Bellacosa noted the likelihood of numerous "as applied" challenges to the regulations because New York's rent regulated tenancies:

> [A]re likely to bloom as perennials becoming functionally transformed into perpetual stakeholds [potentially resulting in] the functional equivalent of divesture from land owners of reversionary rights to their properties without just compensation and due process. (App. A, 17a.)

ARGUMENT

I. In Light Of The Restriction Of Property Rights Imposed By The New Regulations, There Is No Basis For The Lenient Standard Used By The Court Of Appeals To Review The Relation Between Those Regulations And Their Alleged Objectives.

The Federal Constitution prohibits the government's taking of private property without payment of just compensation and bars the deprivation of property absent due process of law. U.S. Const. Amend. V. and Amend. XIV § 1. The new regulations raise serious issues under the Takings and Due Process Clauses because they (1) compel owners to enter into privity relationships with unknown persons; (2) force owners to rent their property for indefinite and potentially perpetual successive terms to persons with whom the owners never previously had any contractual or statutory privity, nor could reasonably have expected to have such a permanent relationship; (3) authorize physical occupation by such persons upon the owner's property; and (4) deprive owners of reasonable, investment backed expectations, and, in some cases, deprive owners of all economically beneficial use of their property. These constitutionally protected rights were invaded absent any evidence that the regulations substantially advance legitimate state interests.

This Court has classified takings claims in two categories. The first encompasses government action that compels an owner to suffer a physical invasion of its property [*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), *United States v. Causby*, 328 U.S. 256 (1946)], or deprives an owner of all economically viable or productive use of its property. *Lucas v. South Carolina*

Coastal Council, ___ U.S. ___, 112 S. Ct. 2886, 2893 (1992); *c.f. Agins v. City of Tiburon*, 447 U.S. 255 (1980). These government actions constitute a *per se* taking which requires just compensation, regardless of the public interest in support of their regulation.

The second type of taking claim entails a more complex assessment of the purposes and effects of the government action. The challenged government action generally only regulates the *use* of property. However, even regulation of the use of property must be compensated if the purpose of the regulation does not *substantially* advance legitimate state interests or if it has unfairly singled out the private property owner to bear a burden that should be borne by the public as a whole. *Yee v. City of Escondido*, 112 S. Ct. 1522, 1526 (1992); *Nollan v. California Coastal Comm'n.*, 483 U.S. 825 (1987); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 123-125 (1978), *reh'g denied*, 439 U.S. 883 (1978); *Seawall Assoc. v. City of New York*, 74 N.Y.2d 92, 544 N.Y.S.2d 542 (1989), *cert. denied*, 493 U.S. 976 (1989).

Significantly, all types of takings claims are subject to a heightened scrutiny standard of review by the courts. *Nollan*, 483 U.S. at 834 - 837, 841. In the context of a regulatory taking claim, heightened scrutiny review means that the court must closely examine whether a regulation that infringes upon a protected property interest *substantially* advances a legitimate state interest.[3] The *Nollan* Court

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[3] While the government's burden in defending a land use regulation against a regulatory taking claim is less than that in a *per se* taking case, under the required heightened scrutiny standard, the government must still do more than what DHCR has done here, *i.e.*, simply pronounce public interests it wishes to

stressed that:

> We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination . . . . [O]ur cases describe the condition for abridgement of property rights through the police power as a **"substantial advanc[ing]"** of a legitimate state interest.

483 U.S. at 841 (emphasis in the original).

The new regulations radically expanded the term "family member of the tenant" beyond the discrete set of blood and spousal relatives,[4] and (b) significantly changed the manner in which formerly and newly defined "family members" could obtain potentially perpetual rights of tenancy and rent regulated apartments without the owner's consent.

Under the new regulations, occupants (of both rent controlled and rent stabilized apartments) with distant or no blood or spousal relationship to the tenant, could succeed, in potential perpetuity, to valuable and scarce rent regulated apartments whenever the tenant of record "permanently vacates." DHCR drastically reduced the occupancy threshold for succession by traditional family members, as well as by unrelated occupants, roommates and distant relatives, and eliminated all of the differences between the rent stabilization and rent control systems in this area.

Under the New Regulations, any person who has co-occupied either a rent controlled or rent stabilized apartment with the tenant of record for two years or less,

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advance. *Lucas*, *supra*, at 2901 - 2902.

[4] 1987 RSC § 2520.6(o); ETPR § 2500.2(m) had a similar definition for "immediate family." There was no definition for "family member of a tenant" in the rent control regulations.

can qualify for potentially perpetual rent regulated tenancy rights if he/she proves "emotional and financial commitment and interdependence" with the tenant. Numerous details of the relationship between the occupant and the tenant may be examined; however, *none is dispositive.*

Completely separate and apart from creating a new definition of "family member," DHCR also radically diminished the co-occupancy criteria that previously applied to traditional family members before they could acquire tenancy succession rights.[5]

In *Yee v. City of Escondido*, 112 S.Ct. 1522, this Court enumerated regulatory infringements on property that may be considered unconstitutional takings without just compensation. Among the proscribed hardships articulated in *Yee* are:

> • Owners not being able to decide who their tenants will be ("inability to select their incoming tenants") 112 S.Ct. at 1528, 1530.
>
> • Owners not being able to exclude strangers, absent extraordinary and costly measures. 112 S.Ct. at 1528.
>
> • Owners not being able to easily convert their property to other uses. 112 S.Ct. at 1528.
>
> • Regulations, in effect, transferring a right to occupy a land indefinitely at a submarket rent from the owner to the tenant. 112 S.Ct. at 1528.
>
> • Regulations not benefiting the intended beneficiaries. 112 S.Ct. at 1530.

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[5] Under the New Regulations, the distinction between a tenant's voluntary vacatur from an apartment and a tenant's involuntary vacatur due to death is completely eliminated without any explanation from DHCR. *Any occupant* could succeed to the tenant's rent regulated tenancy -- *regardless of the reasons why the tenant vacated* -- if that occupant has resided in the apartment for two years or less.

While these types of government infringements in private rental property were not considered *per se* physical takings in *Yee*, *Yee* makes clear that certain types of rent regulation could, under appropriate circumstances, rise to the level of a regulatory taking if the government does not provide just compensation.

Whether a rent regulation amounts to a regulatory taking involves a balancing between the adjustment of rights and the public good. Where the adjustment for the public good becomes so disproportionate that the governmental action is "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," a regulatory taking will have occurred. *Armstrong v. United States*, 364 U.S. 40 (1960); *Seawall Assoc. v. City of New York*, 74 N.Y.2d 92 at 107.

In the instant case, DHCR premises its New Regulations upon the purported state interest in resolving four difficult societal problems: an alleged low vacancy rate in housing; homelessness; poverty; and the AIDS crisis. Notably, although these economic, social and medical problems receive repeated reference in DHCR's Regulatory Impact Statements, Certifications and Statements of Emergency, the actual text of the New Regulations themselves are **totally silent** regarding the alleviation of these problems via the regulatory scheme. There is no income test, no means test, no age test, no disability test, no illness test, no lack-of-alternative-housing test, or any other standard, threshold or requisite element which would somehow ensure that these rules would actually, let alone substantially, advance the state interests alleged by DHCR and cited by the Court of Appeals.

In the face of this, the Court of Appeals did nothing more than pay lip service to *Nollan's* requirement of a "close causal nexus between the challenged regulations and the stated purpose." App. A, 13a - 15a. It devoted all of one sentence to actually examining this nexus: "People who would, absent the regulations, be threatened with eviction from their homes may now have the right to remain." App. A, 14a.

This cursory analysis utterly fails to address the question of whether the new rules substantially alleviate the problems identified by the Court -- the low vacancy rate, increasing homelessness and poverty, and the AIDS epidemic. App. A, 5a. Because the new rules are totally lacking in any qualifying criteria related to these problems, it is only by random chance that those who actually benefit from the rules will be the one suffering from these problems.[6]

Strangely enough, the Court of Appeals identifies this very factor -- whether the persons who benefit are the ones in need of benefit -- to distinguish the new succession rules from the single room occupancy law that it struck down in its previous major takings case, *Seawall Assoc. v. City of New York*:

> In *Seawall*, on the other hand, forcing owners to let single room occupancy accommodations did not substantially advance the City's interest in alleviating homelessness because those units would

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[6] The Court identified a fifth factor as well -- "the rise in non-traditional families." App. A, 5a. The new rules, however, go far beyond addressing non-traditional families, since they effectively include practically *any* financially interdependent group of friends who live together for a sufficient amount of time.

> not necessarily have been rented to homeless or potentially homeless persons." App. A, 14a, citing *Seawall*, 74 N.Y.2d at 111, 112 n.11.

But the new succession rules obviously fare no better in this regard. DHCR did not so much as feign an attempt below at tying the New Regulations to the state interests that are alleged to be the reason and rationale for their enactment. Moreover, the persons whom they benefit may be rich as well as poor and healthy as well as ill. They may as likely have access to alternative housing as not. As for alleviating the low vacancy rate, the rules can only worsen the situation, not better it. Every unit occupied by a beneficiary of the new rules is a unit not available to someone else, and the tightened regulatory rigidity can only discourage further investment in housing.[7]

Unfortunately, the requisite high standard of review has *never* been actually applied to the new regulations. Although both the Appellate Division, First Judicial Department and New York Court of Appeals affirmatively confirmed the requirement that the regulations pass constitutional muster via compliance with the *Nollan* heightened scrutiny/sub-stantial advancement test, neither court engaged in an actual analysis which draws a nexus from a legitimate state interest to the substantial advancement thereof. As is described above, following the Appellate Division's

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[7] "There is a growing consensus that 'rent control causes a reduction in the quality of the existing housing stock and discourages investment in new rental property,' actually exacerbating the problems it is intended to ameliorate." *Hall v. City of Santa Barbara*, 797 F.2d 1493, 1503 n.26 (9th Cir. 1986), quoting The Report of the President's Commission on Housing 91 (1982).

confirming the applicability of the *Nollan* standard, the Appellate Division then refrained in engaging in any actual *Nollan*-type analysis. Similarly, following the Court of Appeals' agreement as to the applicability of the *Nollan* standard, no *Nollan*-type analysis was engaged in; to the contrary, the court of Appeals engaged in an irrelevant deference to the administrative agency's expertise in the field of housing -- an overt avoidance of the requisite means/ends analysis mandated by *Nollan*.

Again, although much appellate "lip service" has been given to the necessity of adhering to the heightened scrutiny mandated by this Court in *Nollan*, a true *Nollan*-type analysis has *never* been applied to the regulations at issue.

II. The Court Of Appeals Decision Totally Ignores The Issue Of Whether Landlords Are Responsible For The Social Problems Targeted By The New Succession Rules; It Thus Omits A Fundamental Element Of Takings Jurisprudence -- That Public Burdens, Such As Homelessness And Poverty, Should Be Borne By The Public At Large, Rather Than By Landlords.

In its decision the Court of Appeals described the following grounds for DHCR's new rules: "New York's chronic low rental vacancy rate for affordable units, increasing homelessness and poverty, the AIDS epidemic and the rise in non-traditional families. . . ." App. A, 5a. These social problems have one key feature in common -- they are, in no sense, the fault of landlords who bear the full regulatory costs of the new rules. As is shown below, the connection between a social problem and the individuals forced to bear the costs of its alleviation is key criterion in determining whether a regulation of property constitutes a

taking. It is also a criterion that the Court of Appeals failed to address, and that the new rules themselves utterly failed to meet.

A. The Supreme Court Has Established That Under The Takings Clause, Property Owners Cannot Be Singled Out To Bear The Cost Of Curing Social Problems Which They Had No Hand In Creating.

For more than a century, Supreme Court decisions have made it clear that the takings clause embodies a fundamental notion of fairness in the allocation of social burdens. The constitutional guarantee of just compensation is intended to prevent individuals from being forced to "surrender to the public something more and different from that which is exacted from other members of the public." *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893). It is aimed at preventing the state from "loading upon the individual more than his just share of the burdens of government." *Id.* The ban on uncompensated takings "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

As this court noted only two years ago, a regulatory taking can occur when a "regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole." *Yee v. City of Escondido*, 112 Sup. Ct. 1522, 1526 (1992).

Fairness is not the only purpose of the Takings Clause in this context. As the New York Court of Appeals itself recognized in the past, the requirement of

compensation also acts as a major brake on the political incentive to conceal the costs of government programs by loading them onto unlucky individuals. It thus reduces the natural public demand for even more seemingly free benefits:

> The ultimate evil of a deprivation of property . . . under the guise of an exercise of the police power is that it forces the owner to assume the cost of providing a benefit to the public without recoupment. There is no attempt to share the cost of the benefit among those benefited, that is, society at large. Instead, the accident of ownership determines who shall bear the cost initially. Of course, as further consequence, the ultimate economic cost of providing the benefit is hidden from those who in a democratic society are given the power of deciding . . . When [the social cost is] successfully concealed, the public is not likely to have any objection to the "cost free" benefit.

Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587, 596 - 97, 385 N.Y.S.2d 5, 11 (1976).[8]

The new succession rules operate in precisely this manner. Their cost, in the form of reduced rent rolls,

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[8] *See, also, Pennell v. City of San Jose*, 485 U.S. 1, 22 (1988) (Scalia, J., joined by O'Connor, J., concurring in part and dissenting in part): "The politically attractive feature of regulation is not that it permits wealth transfers to be achieved that could not be achieved otherwise; but rather that it permits them to be achieved 'off budget', with relative invisibility and thus relative immunity from normal democratic processes." In contrast, consider the politically *unattractive* feature of "on budget" steps: "Guiliani Cuts Cash Incentives to Landlords to House Homeless", New York Times, March 16, 1994, p. B1.

reduced control over tenant selection and diminished ability to recover vacant apartments is borne solely by landlords. For this reason alone, the new rules, "even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause." *Nollan*, 107 Sup. Ct. at 3147 n.4.

B. The Important Issues Of Tenant Hardship Which This Court Found Premature In Pennell v. City Of San Jose Are Ripe For Consideration In This Case.

In *Pennell v. City of San Jose*, 485 U.S. 1 (1988), this Court reviewed, at considerable length, a San Jose rent control ordinance that allowed otherwise reasonable rent increases to be reduced upon a tenant's showing of hardship. The Court ultimately ruled the landlords' facial challenge to be premature, because there was no showing that the hardship factor had in fact ever been used; that is, that it " has in fact ever been relied upon by a hearing officer to reduce a rent below the figure it would have been set at . . ." *Id.* at 9 - 10.

Like *Pennell*, the instant case also involves tenant hardship as a basis for restricting landlord rights. Like *Pennell*, it too is facial challenge. But unlike *Pennell*, in the instant case there is no question that the new rules are preventing evictions and vacancies that would otherwise have occurred. In the Court of Appeals' words, tenants "who would, absent the regulations, be threatened with eviction from their homes may now have the right to remain." App. A, 15a.

Not surprisingly, there have been numerous cases involving the application of the new rules. Family members, as defined by the new regulations, have been awarded full

rights of rent regulated tenancy via the implementation of the new regulations in *RSP Realty Assoc. v. Paege*, N.Y.L.J. Aug. 14, 1992, p. 21, col. 4 (App. T. 1st Dep't); *43-45 West 129th Street HDFC v. Doe*, N.Y.L.J. March 22, 1992, p. 31, col. 2 (Civ. Ct. N.Y. Co.); *Weehawken St. Assoc. v. Nudorg*, N.Y.L.J. March 26, 1991, p. 21, col. 3 (App. T. 1st Dep't); *King v. Hart*, N.Y.L.J. June 15, 1990, p. 21, col. 1 (App. T. 1st Dep't); *Yoba v. Young*, N.Y.L.J. Sept. 25, 1991, p. 27, col. 2 (Civ. Ct. N.Y. Co.); *Estate of James Smith v. Attwood*, N.Y.L.J. May 18, 1990, p. 21, col. 6 (App. T. 1st Dep't); *Seminole Housing Corp. v. Leone*, N.Y.L.J. May 24, 1990, p. 27, col. 4 (App. T. 2nd & 11th Jud. Dep'ts); *Park Holding Co. v. Anderson*, N.Y.L.J. Apr. 12, 1990, p. 27, col. 3 (App. T. 1st Dep't); *Estate of Causse*, N.Y.L.J. Nov. 28, 1990, p. 23, col. 2 (Sur. Ct. N.Y. Co.); *Lerad Realty Co. v. Reynolds*, N.Y.L.J. Aug. 29, 1990, p. 22, col. 5 (Civ. Ct. N.Y. Co.); *Lepar Realty Co. v. Griffin*, 151 Misc. 2d 579, 581 N.Y.S.2d 521 (App. T. 1st Dep't 1991).

In short, this case presents an opportunity for this Court to resolve issues of tenant hardship and landlord property rights which were left unresolved in *Pennell* and whose seriousness is indicated by the lengthy separate opinion in that case. 485 U.S. at 15 - 24 (Justices Scalia and O'Connor concurring in part and dissenting in part.) The considerations which warranted review in that case are fully operative here.

III. New York's Vast Expansion Of The Term "Family Member" For Succession Purposes Is An Unconstitutional Attempt To Alter Property Rights By Means Of Ipse Dixit Redefinitions.

Prior to the new rules, owners of rent-controlled and

rent stabilized apartments were subject to numerous restrictions on their property -- restrictions whose validity is neither challenged nor conceded in this case. These owners did, nonetheless, retain a reversionary interest in rental units that became vacant when they were not occupied by qualified family members under the old succession rules.

With DHCR's vast enlargement by redefinition of "family," that reversionary interest has consequently been significantly reduced. In the context of property rights, however, "family" is a major concept that cannot be administratively altered at will. As this Court's decisions in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) and *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), demonstrate, there is a significant difference between the state's power to regulate living arrangements between unrelated individuals as compared to those involving people related by "blood, adoption, or marriage." *Moore*, 431 U.S. at 498. Regulations involving the former are subject to typical judicial deference, while regulations concerning the latter demand heightened scrutiny. *Id.* at 498 - 99. Thus in *Belle Terre* this Court upheld a zoning restriction on the number of unrelated individuals who could occupy a single unit, while in *Moore* it struck down an ordinance which prevented a grandmother from living with her grandson.

More importantly, when property rights depend directly on the definition of "family," as in the case of the landlords' reversionary interests, any redefinition of that term by the state results in a redefinition of the property right itself. It is clear, however, that "government does not have unlimited power to redefine property rights." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 (1982). When the state does engage in redefinition of a

scope comparable to that involved here, it engages in a taking. A "State, by *ipse dixit*, may not transform private property into public property without compensation." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). In redefining the term "family" through its new succession rules, New York has engaged in precisely such an *ipse dixit* transformation.

IV. The Court of Appeals' Dismissal Of The Taking By Physical Occupation Issue Flies in The Face of This Court's Decision in Yee v. City of Escondido.

The landlords raised the claim that the new rules would create perpetual tenancies to a far greater degree than had existed under the prior rules. This was due both to the greatly expanded definition of family member, and to the reduced co-residency requirement which would make it easier to qualify for protection. Decision below, App. A, 4a - 5a.

The Court of Appeals rejected this claim, ruling that tenancies of indefinite duration did not "without more [constitute] a permanent physical occupation of property." App. A, 11a. In the Court's view, the distinguishing feature here was that there had been a "voluntary acquiescence" by the landlords "in the use of [their] property for rental housing . . ." App. A, 12a, citing *Yee v. City of Escondido*, 112 Sup. Ct. 1522 (1992).

This analysis is fundamentally flawed, because it ignores the fact that, under New York State Law, these landlords are barred from withdrawing their acquiescence; that is, they cannot unilaterally decide to go out of the rental business, but instead must meet specified statutory criteria before they can evict their tenants and withdraw

their properties from the rental market. Under rent control, for example, eviction certificates can only be issued on the basis of the criteria set out in N.Y.C.R.R. § 26-408b. This statute allows eviction only under strictly limited circumstances -- for example, a landlord wishing to personally occupy his premises must show an "immediate and compelling necessity;" the tenants he seeks to remove must be under the age of sixty two, they must have resided in the house for less than twenty years and they must not be medically impaired. § 26-408b(1).

As a result of this and related statutes, there is "a total absence of any remedy to a landlord who does not qualify but just wants to cease being a landlord altogether" -- an outcome that the New York courts upheld against constitutional challenge in *Sobel v. Higgins*, 151 Misc. 2d 876, 573 N.Y.S.2d 1000, 1003 (Sup. Ct. 1991), *aff'd*, 590 N.Y.S.2d 883 (App. Div. 1992), *leave to appeal denied*, ___ N.Y.2d ___ (1993). In the words of the New York Appellate Division, the tenant (in that case) had "a perpetual right to remain in possession." 590 N.Y.S.2d at 884.

The situation for rent-stabilized apartments is essentially the same. The "rent stabilized tenant, like his rent controlled neighbor, enjoys occupancy for so long as he wishes." *Resolution Trust Corp. v. Diamond*, ___ F.3d ___, No. 92-6244 (2d Cir., Mar. 2, 1994), sl. op. at 6.

It is clear from *Yee*, however, that such perpetual tenancies may well constitute takings by physical occupation. While *Yee* upheld a California municipal rent control statute, it did so in a statutory context that *recognized* a landlord's right to cease renting at will, and thus was exactly the opposite of New York's:

> At least on the face of the regulatory scheme, neither the City nor the State compels petitioners, once they have rented their property to tenants, to continue doing so. To the contrary, the Mobilehome Residency Law provides that a park owner who wishes to change the use of his land may evict his tenants . . . Put bluntly, no government has required any physical invasion of petitioners property . . . While the 'right to exclude' is doubtless . . . 'one of the most essential sticks in the bundle of rights that are commonly characterized as property,' *Kaiser Aetna v. United States*, 444 U.S. 164, 176 . . . (1979), we do not find that right to have been taken from petitioners on the mere face of the Escondido ordinance.

112 Sup. Ct. at 1528.

Most importantly, in *Yee* the Supreme Court made it clear that, if the law *had* compelled the landowners to rent, then it would have been unconstitutional:

> A different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent or to refrain in perpetuity from terminating a tenancy.

112 Sup. Ct. at 1529; *Nollan v. California Coastal Commission*, 483 U.S. 825, 831-32 (1987); *Fresh Pond Shopping Center, Inc., v. Callahan*, 464 U.S. 875, 877 (1983) (Rehnquist, J., dissenting).

While perpetual tenancies in New York did not originate with the new succession rules, under these rules they clearly will become more common. The Court of Appeals brushed aside the physical takings question with its reference to the landlords' "voluntary acquiescence" to

renting their property. App. A, 12a. But as the above quote from *Yee* indicates, physical takings can result not only from forcing a landlord to begin renting, but also from mandating that he continue to rent. The Court of Appeals may have cited *Yee* in disposing of this issue, but its treatment of the question was in fact directly contrary to *Yee*.

CONCLUSION

This case represents a dramatic and frightening example of an administrative agency imposing the costs of its view of societal problems, social mores, inheritance and sanctity of contract upon a group of innocent property owners in violation of constitutional provisions, principles and precedent. More than one million apartments and more than 25,000 owners of property throughout the State of New York are affected by these Regulations. An unelected and, ultimately, non-accountable bureaucratic agency has taken it upon itself to redefine the notions of family, tenancy, contract and inheritance predicated solely upon a bald articulation of its avowed purposes, absent any close and substantial nexus between the alleged state purposes and the actual effect of the Regulations at issue.

Although the appellate courts below consistently recognized the requirements of carefully finding a close nexus between regulatory purpose and effect and examining such nexus under a heightened scrutiny standard, that analysis, as mandated by this Court, was *never* undertaken.

Plaintiffs do not contend that all forms of rent regulation are unconstitutional. Nor do plaintiffs deny that the State may regulate rental housing pursuant to its police powers. However, the voluntary placement of property into

the rental housing market does not mean that the government has the right to take away all control over the property from its owner, place it into the hands of unknown third parties, and provide the owner with no compensation for these lost rights. A governmental agency does not have the right to unilaterally destroy the value of private property by eliminating its reversionary and exclusionary qualities without paying just compensation to the aggrieved property owners. Petitioners submit that the challenged Regulations are an overt usurpation of valuable and intrinsic property rights.

The New York State Division of Housing and Community Renewal crossed the constitutional bright line standard. By failing to properly analyze the regulations at issue, New York's Court of Appeals ruled in a manner that conflicts with this Court's decisions and that raises serious issues regarding the property rights of a vast number of innocent landlords.

For these reasons, petitioners respectfully urge this Court to grant the Petition for a Writ of Certiorari.

Dated: *New York, New York*
March 21, 1994

Respectfully submitted,

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No. 93 - _____

In The

Supreme Court of the United States

October Term, 1993

THE RENT STABILIZATION ASSOCIATION OF NEW YORK CITY, INC., THE DELANO VILLAGE COMPANIES, RIVERDALE GARDENS, COLISEUM PARK APARTMENTS CO., and SMALL PROPERTY OWNERS OF NEW YORK,

Petitioners,

-against-

RICHARD L. HIGGINS, Commissioner of the New York State Division of Housing and Community Renewal, ROBERT WELLS, EVERETT QUINTON, GAY MEN'S HEALTH CRISIS, INC., JANET GOODMAN, KAIROS RENCHER, and DISABLED IN ACTION,

Respondents.

APPENDIX

St. Louis & Westervelt, Inc.

Appendix A - Opinion And Order of The New York State Court of Appeals, Decided December 21, 1993 [Pages 1a - 17a]

State of New York Court of Appeals

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1 No. 259
Rent Stabilization Association of New York City, Inc., et al.,
Appellants,
and Small Property Owners of New York,
Intervenor-Appellant, **OPINION**
v.
Richard L. Higgins, & c.
Respondent,
and Robert Wells, et al.,
Intervenors-Respondents.

Sherwin Belkin, for appellants.
Ronald D. Hariri, for intervenor-appellant.
Cullen S. McVoy, for respondent.
Paris R. Baldacci, for intervenors-respondents.
Community Housing Improvement Program, Inc.; Pacific Legal Foundation; New York State Tenant and Neighborhood Coalition, Inc., et al.; Eastern Paralyzed Veterans Association, et al.; City of New York; and The Real Estate Board of New York, Inc., amici curiae.

KAYE, CHIEF JUDGE:

Essentially two challenges are mounted by appellant-property owners to regulations promulgated by respondent Division of Housing and Community Renewal (DHCR)

enlarging the class of "family members" entitled to succeed to a rent-regulated apartment on the death or departure of the tenant of record. As did the Appellate Division, we conclude first that the regulations are within the agency's rulemaking authority, and second that no unconstitutional "taking" was effected.

I.

We begin with the background of the challenged regulations. In response to what it found to be a severe housing shortage following World War II, the legislature enacted laws providing for rent control and, later, rent stabilization.[1] Perceiving that continuing need throughout the ensuing decades, the legislature has periodically extended rent regulation to the present day, most recently providing for decontrol only of apartments with monthly rents in excess of two thousand dollars (see, Rent Regulation Reform Act of 1993, L 1993, ch 253 [extending rent control and rent stabilization until June 15, 1997]).

The legislature in 1983 designated DHCR "the sole administrative agency to administer the regulation of residential rents" under the rent control and rent stabilization statutes (Omnibus Housing Act, L 1983, ch 403, § 3), and in 1985 additionally granted DHCR authority to amend the Rent Stabilization Code (a body of regulations previously administered by a private association of property owners) (see, L 1985, ch 888, § 2).

The rent control statute accorded noneviction

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[1] See, Emergency Housing Rent Control Law (L 1946, ch 274, as amended [rent control outside New York City]); Local Emergency Housing Rent Control Act (L 1962, ch 21, as amended [rent control within New York City]); Rent Stabilization Law (Administrative Code of the City of New York §§ 26-501 to 26-520, as amended [1962] [rent stabilization within New York City]); and Emergency Tenant Protection Act [L 1974, ch 576, as amended [rent stabilization outside New York City]).

protection to a "tenant," meaning that the tenant had the right to remain after expiration of the original tenancy (see, McKinney's Uncons Laws of NY § 8585 [1] [1984]; Administrative Code § 26-408 [a] [1985]). In the event of the tenant's death, the rent control regulations promulgated under the statute additionally prohibited eviction of the surviving spouse or a family member who had been living with the tenant (see, 9 NYCRR 2104.6 [d] [1987]; 2204.6 [d] [1987]). That protection was later extended to family members living with a tenant who voluntarily vacated the apartment (see, Matter of Herzog v Joy, 74 AD2d 372, 376, affd 53 NY2d 821).

The rent stabilization statute required that a renewal lease be offered to a "tenant" (see, Administrative Code § YY51-6.0 [c] [4] [1969]), but nothing in the regulations elaborated upon the statutory language. Thus, unlike rent Control, under rent stabilization only the tenant of record was entitled to a renewal lease (see, Sullivan v Brevard, 66 NY2d 489, 493). In 1987, however, DHCR amended the rent stabilization regulations to provide noneviction protection to "family members," a term defined in the Code to include 24 specified blood-or-marriage relationships (see, 9 NYCRR 2520.6 [0] [1987]). Where the tenant of record died, family members who had resided in the unit for at least two years (one year if the tenant was elderly or disabled) were entitled to succeed to the tenancy; where the tenant of record voluntarily vacated the apartment, family members who had resided in the unit from the inception of the tenancy or commencement of the relationship were entitled to succeed to the tenancy (see, 9 NYCRR 2523.5 [b] [1987]).

DHCR's amendments to the Rent Stabilization Code were sustained by the Appellate Division as an appropriate exercise of the agency's authority (see, Festa v Leshen, 145 AD2d 49) and are not challenged on the present appeal.

APPENDIX A

[Opinion And Order of New York Court of Appeals 1993]

This Court in 1989 determined that "family member" as used in the rent control regulations included the life partner of a deceased tenant who had resided with the tenant for many years in a familial-type relationship (see, Braschi v Stahl Assocs. Co., 74 NY2d 201, 211; see also, E. 10th St. Assocs. v Estate of Goldstein, 154 AD2d 142 [extending holding in Braschi to rent stabilization regulations]). Months later, DHCR promulgated the regulations at issue on this appeal.

II.

The regulations were first issued by DHCR on November 8, 1989 as emergency regulations extending noneviction protection to qualified family members of a tenant of record in all rent-regulated housing where the tenant vacated the unit. The regulations were made permanent on March 20, 1990 after public hearings and became effective April 4, 1990.[2]

The regulations enlarged the definition of "family member," beyond blood or marriage, to include:

> Any other person residing with the tenant or permanent tenant in the housing accommodation as a primary or principal residence, respectively, who can prove emotional and financial commitment and interdependence between such person and the tenant or permanent tenant. Although no single factor shall be solely determinative, evidence which is to be considered in determining whether such emotional and financial commitment and interdependence

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[2] See, Rent and Eviction Regulations (9 NYCRR 2104.6 [d] [rent control outside New York City]; 2204.6 [d] [rent control within New York City]); Emergency Tenant Protection Regulations (9 NYCRR 2500.2 [n], 2503.5 [d] [rent stabilization outside New York City]); Rent Stabilization Code (9 NYCRR 2520.6 [o], 2523.5 [b] [rent stabilization within New York City]).

> existed may include, without limitation, such factors as listed below. In no event would evidence of a sexual relationship between such persons be required or considered.

The specified relevant factors are i) longevity of the relationship; ii) whether the parties share household expenses; iii) intermingling of finances; iv) whether they engage in family-type activities; v) whether they have formalized legal obligations toward each other; vi) whether they hold themselves out as family members; vii) whether they regularly perform family functions; and viii) any other pattern of behavior that evidences an intention to create a long term, emotionally committed relationship. The amendments extend noneviction protection uniformly to family members whether the tenant dies or vacates voluntarily, so long as the family member has resided in the apartment for two years (one year where the tenant is elderly or disabled), or has resided with the tenant from the inception of the tenancy or the commencement of the relationship.

As the grounds for its action, DHCR specified New York's chronic low rental vacancy rate for affordable units, increasing homelessness and poverty, the AIDS epidemic and the rise in non-traditional families (including same-sex couples, de facto marriages, single parent households and other living arrangements no longer exceptional). The regulations, according to DHCR, were "intended to clarify a non-traditional family member's right to remain in his or her home, particularly at a time when a significant percentage of these households may be vulnerable to the AIDS epidemic." In extending the protection to all qualified family members regardless of the reason for the tenant's permanent departure, DHCR claimed that it redressed a situation that in its experience had led to illogical and unjust results.

APPENDIX A
[Opinion And Order of New York Court of Appeals 1993]

In releasing the regulations, DHCR stated that New York's crisis in affordable housing posed an immediate threat requiring emergency regulations because, with tenants dying or vacating apartments daily, landlords and remaining occupants needed guidance and some measure of consistency in determining who would be permitted to remain in rent-regulated housing and who could be evicted. In assessing the added burden on property owners, DHCR concluded that the average building's rent rolls would be reduced by .045% due to fewer regulated apartments subject to a vacancy increase in any given year. DHCR further found the effect of the regulations directly proportional to the number of units owned, thus concluding that small property owners would not be disproportionately affected. Finally, DHCR noted that an owner's right to collect the regulated rent and evict undesirable tenants would be unaffected by the new regulations.

Appellants sought a preliminary injunction and a declaration that the new regulations were unconstitutional and invalid, and Supreme Court temporarily restrained their implementation; the Appellate Division, however, deeming the TRO a preliminary injunction, reversed and vacated the restraint (164 AD2d 283). After Supreme Court granted respondents' cross-motion for a declaration that the regulations were within the proper exercise of DHCR's authority, appellants sought a direct appeal to this Court, which we transferred to the Appellate Division on the ground that questions other than the constitutional validity of a statute were involved (see, CPLR 5601 [b] [2]). The Appellate Division upheld the regulations as a valid exercise of DHCR's authority for the reasons set forth in its opinion vacating the preliminary injunction, adding that the regulations substantially advance a legitimate governmental interest under the most recent United States Supreme Court opinions addressing regulatory takings (see, Lucas v

South Carolina Coastal Council, 505 US ___; Yee v City of Escondido, 503 US ___). Because a substantial constitutional question is directly presented, appeal to this Court lies as of right (see, CPLR 5601 [b] [1]).

III.

We first address appellants' assertion that DHCR was without authority to adopt the challenged regulations.

Appellants recognize that the legislature has provided DHCR a broad mandate to promulgate regulations in furtherance of the rent control and rent stabilization laws that will "inevitably require some changes in the legal relationship between landlords and tenants" (see, Matter of Versailles Realty Co. v New York State Div. of Hous. and Community Renewal, 76 NY2d 325, 328 - 329, rearg. denied 76 NY2d 890),[3] and indeed do not challenge earlier regulations providing for family succession to rent-regulated housing. They urge, however, that with the most recent regulations, DHCR has overstepped its mandate and invaded the province of the legislature, in violation of the constitutional separation of powers.

As an arm of the executive branch of government, an administrative agency may not, in the exercise of rulemaking authority, engage in broad-based public policy determinations (see, Boreali v Axelrod, 71 NY2d 1, 9). In Boreali, we concluded that the difficult-to-demarcate line between administrative rulemaking and legislative policymaking had

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[3] See, McKinney's Uncons Laws of NY § 8584 (4) (DHCR empowered to "adopt, promulgate, amend or rescind such rules, regulations and orders as it may deem necessary or proper to effectuate the purposes of" rent control); Administrative Code § 26-405 (g) (1) (same); McKinney's Uncons Laws of NY § 8630 (DHCR authorized to implement "appropriate" rent stabilization regulations); Administrative Code § 26-511 (DHCR authorized to amend Rent Stabilization Code to "protect [] tenants and the public interest").

been transgressed, and invalidated regulations promulgated by the Public Health Council prohibiting indoor smoking in specified public areas on the ground that the regulatory scheme was improperly based upon policy considerations originating with the agency and not the legislature. We identified four "coalescing circumstances" indicating that the agency, in enacting the regulation, had usurped the role of the legislature in making public policy assessments.

First, the agency created exemptions from the smoking ban for particular indoor areas, such as trade shows, conventions and bars, or upon a showing of financial hardship, from which we concluded that the agency had improperly weighed competing health and public policy concerns. Exempting certain indoor areas from these regulations required consideration not of health concerns--the agency's proper focus--but of competing social and political issues. Second, the agency enacted the smoking ban on a clean slate, exceeding its proper role of merely filling the interstices of a legislative mandate. Third, the legislature itself had repeatedly failed to reach agreement on indoor smoking, suggesting that the subject was one that required resolution of competing policy interests. Finally, the regulatory scheme--"a simple code describing the locales in which smoking would be prohibited and providing exemptions for various special interest groups"--did not require the agency's particular competence in the field of public health.

Such circumstances are not present in this case. Rather, in defining the persons to be afforded noneviction protection in an ongoing housing crisis, DHCR has acted within its competence and authority (see, Matter of Consolidated Edison Co. v Department of Environmental Protection, 71 NY2d 186, 191-192; Matter of Nicholas v Kahn, 47 NY2d 24, 31).

Most significantly, DHCR has not acted on a clean

slate--noneviction protection in rent-regulated housing was first created by the legislature in the rent control and rent stabilization laws (see, McKinney's Uncons Laws of NY § 8585 [1]; Administrative Code §§ 26-408 [a], 26-511 [c] [4]). This protection has in the past been enlarged by the agency, after which the legislature has voted to extend rent regulation without modifying those provisions.

The challenged regulations "fill in the interstices" of the legislative mandate (see, Versailles Realty, 76 NY2d at 329) by redefining the protected class of people to include those who, in DHCR's experience as sole administrator of residential rent regulation and adjudicator of eviction disputes, are most in need of protection against loss of their homes in a continuing housing emergency. Adjustment of the existing scheme in light of the agency's technical competence is well within the proper rulemaking function of this agency. Moreover, unlike the Public Health Council in Boreali, DHCR has not enacted categorical exemptions reflecting accommodations to special interest groups.

Finally, although appellants point to 27 bills introduced in the legislature between 1986 and 1989 relating to succession rights, the legislature has not sought to alter succession rights in the years following DHCR's emergency and later permanent regulations (see also, Festa, 145 AD2d at 63). Of particular significance is the fact that the legislature this year made substantial reforms in rent regulation, including decontrol of luxury units, without addressing noneviction protection (see, Rent Regulation Reform Act of 1993, L 1993, ch 253). We cannot agree with appellants that, in these circumstances, the failed bills alone warrant the conclusion that the agency has exceeded its mandate (see also, Boreali, 71 NY2d at 11).

Thus, we reject appellants' contention that DHCR acted beyond its authority.

IV.

Appellants next urge that the challenged regulations are unconstitutional on their face because, without just compensation, they require owners of rent-regulated housing to suffer a permanent physical occupation of their property; deprive them of the beneficial use of their property; and fail to substantially advance a legitimate governmental objective (see, NY Const, art I, § 7 [a]; US Const, 5th Amend).

This appeal does not put before us the question whether rent regulation itself constitutes a taking -- a question that has excited recent scholarly interest (see, e.g., Radford, Regulatory Takings Law in the 1990's: The Death of Rent Control?, 21 Sw U L Rev 1019 [1992]; Note, Bright Lines in the Big City: Seawall, Tenant Successions Rights, and the Jurisprudence of Takings, 91 Colum L Rev 609 [1991]; but see, Pennell v City of San Jose, 485 US 1, 12, n 6; Block v Hirsh, 256 US 135, 156; Loab Estates, Inc. v Druhe, 300 NY 176, 180). Appellants challenge only the recent family-succession amendments to the rent control and rent stabilization regulations. We note, further, that in this facial challenge, appellants bear the heavy burden of overcoming the presumption of constitutionality that attaches to the challenged enactments (see, e.g., De St. Aubin v Flacke, 68 NY2d 66, 76; Loretto v Teleprompter Manhattan CATV Corp., 458 US 419, 440). Appellants have failed to sustain that burden.

A. Physical Occupation

Governmental action that compels an owner to endure a permanent physical occupation of its property effects an unconstitutional taking per se (see, Yee, 503 US at ____ [112 S Ct at 1526]; Loretto, 458 US at 434-435). Appellants claim that they are forced by the new regulations to accept strangers as tenants and that these tenancies, no longer restricted to blood-or-marriage relatives of the original tenant, will exist in perpetuity. Because the

co-residency requirement in the case of a tenant who voluntarily vacates has been reduced to the shorter of two years (one year in the case of elderly or disabled tenants) or the inception of the tenancy or commencement of the relationship, appellants further complain that the new regulations make it easier to qualify for protection.

At the outset, we are unpersuaded by the argument that the new regulations have created perpetual tenancies. An owner's right to evict an unsatisfactory tenant or convert rent-regulated property to other uses remains unaffected (see, 9 NYCRR 2104, 2204, 2504, 2524; Yee, 503 US at ____ [112 S Ct at 1528-1529]). That a rent-regulated tenancy might itself be of indefinite duration--as has long been the case under rent control and rent stabilization--does not, without more, render it a permanent physical occupation of property (see, Manheim, Tenant Eviction Protection and the Takings Clause, 1989 Wisc L Rev 925, 991-993 [1989]).

Nor does the fact that an owner must offer a renewal lease to a departed tenant's newly-defined family member--potentially a stranger to the owner--give rise to such a physical occupation (see, Yee, 503 US at ____ [112 S Ct at 1528]). In Seawall Assocs. v City of New York (74 NY2d 92, 105, cert denied 493 US 976), we held that Local Law 9, which required owners of single room occupancy housing accommodations to rehabilitate and rent out their units, forcing them "to subject their properties to a use which they neither planned nor desired," constituted a physical taking per se. By contrast, in Yee, the Supreme Court held that requiring owners of mobile home parks to rent the "pad" beneath a mobile home at controlled rents to any purchaser of the mobile home did not constitute a physical occupation because the owners had "voluntar[ily] open[ed] their property to occupation by others" and thus could not "assert a per se right to compensation based on their

inability to exclude particular individuals" (Yee, 503 US at ____ [112 S Ct at 1530]).

The difference -- dispositive here -- between requiring an owner to accept a purported stranger as a tenant and compelling the owner to rent out single room occupancy accommodations is in the owner's voluntary acquiescence in the use of its property for rental housing (see, Yee, 503 US at ____; Federal Communications Commn. v Florida Power Corp., 480 US 245, 252-253; see also, Seawall, 74 NY2d at 105). As we noted in Seawall, "it is the forced occupation[,] * * * not the identities of the new tenants or the terms of the leases, which deprives the owners of their possessory interests and results in physical takings" (Seawall, 74 NY2d at 106). Indeed, once a property owner decides to rent to tenants, the antidiscrimination laws eliminate an owner's unfettered discretion in rejecting tenants (see, Yee, 503 US at ____ [112 S Ct at 1530]; see also, Heart of Atlanta Motel, Inc. v United States, 379 US 241; Manheim, Tenant Eviction Protection and the Takings Clause, 1989 Wisc L Rev at 997-998).

In any event, a "family member" for noneviction purposes, applying all of the criteria established by DHCR, is no more likely to be a stranger to the owner than a family member as formerly defined. This is so because, under either definition, the family member entitled to noneviction protection must have occupied the apartment with the tenant of record in a long-term, committed relationship (to be determined on a case-by-case basis in accordance with the specified criteria). In fact, the challenged regulations additionally permit the owner to request, when offering a renewal lease, the names of all co-occupants and whether they qualify as family members (9 NYCRR 2104.6 [d] [2], 2204.6 [d] [2], 2503.5 [e], 2523.5 [e]).

Because the challenged regulations may require the owner-lessor to accept a new occupant but not a new use

of its rent-regulated property, we conclude that appellants have failed to establish their claim that, facially, a permanent physical occupation of appellants' property has been effected.

B. Regulatory Taking

As an alternative facial challenge, appellants urge that the regulations effect an impermissible regulatory taking, which occurs when governmental action forces some people alone to bear burdens that, in fairness, ought to be borne by society at large (see, Seawall, 74 NY2d at 107). Regulation of private property constitutes an unconstitutional taking if it denies an owner economically viable use of the property (a per se regulatory taking), or if it does not substantially advance legitimate State interests (Seawall, 74 NY2d at 107; Lucas, 505 US at ____ [112 S Ct at 2893]; Nollan v California Coastal Commn., 483 US 825, 834).

Appellants claim, first, that the new regulations deprive them of both the benefit of rental increases that occur upon vacancy and the reversionary interest in their property. However, a regulation effects a per se regulatory taking only in the relatively rare situation where "the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave [the] property economically idle" (Lucas, 505 US at ____ [112 S Ct at 2895]). Here, the regulations do not affect the owner's right to receive the regulated rents, unchallenged as a reasonable return. Moreover, because the tenancies are not perpetual (as discussed above), the owners are not deprived of their reversionary interest (compare, 520 E. 81st St. Assocs. v Lenox Hill Hosp., 157 AD2d 138, 150, revd on other grounds 77 NY2d 944). We thus conclude that the owners have not met their burden of showing the requisite deprivation of economically beneficial use of their property

(see, Lucas, 505 US at ____ [112 S Ct at 2893, n 6]).

Alternatively, appellants maintain that DHCR has failed to demonstrate the challenged regulations substantially advance the concededly legitimate governmental objectives of prevention of unwarranted evictions and alleviation of homelessness (see, Seawall, 74 NY2d at 111). The absence of a close causal nexus between a regulated use of the property and the problem sought to be ameliorated may invalidate a regulation (see, Nollan, 483 US at 837). The owners insist that rent regulation perpetuates rather than alleviates the housing shortage in New York, citing evidence that, faced with a lower overall return from a building, owners will invest less in repairs, hastening the building's deterioration.

The question before us, however, is not the general wisdom or desirability of present rent regulation (the statutes and regulations combined) to address the State's housing situation -- that is a question for the legislature. Rather, the question we decide is whether there is a close casual nexus between the challenged regulations and the stated purpose of preventing the eviction and resulting vulnerability to homelessness of the identified beneficiaries (see, Nollan, 483 US at 837; Seawall, 74 NY2d at 112). We agree with the Appellate Division that there is.

People who would, absent the regulations, be threatened with eviction from their homes may now have the right to remain. In Seawall, on the other hand, forcing owners to let single room occupancy accommodations did not substantially advance the City's interest in alleviating homelessness because those units would not necessarily have been rented to homeless or potentially homeless persons (Seawall, 74 NY2d at 111, 112, n 11). The designation of classes of individuals to whom DHCR has extended noneviction protection--persons deemed by the agency to be threatened with loss of their homes, and therefore in need

of such protection--is a matter that falls within the agency's expertise (see, Teachers Ins. and Annuity Assn. v Landmarks Preservation Commn., 82 NY2d 35, ____).[4]

Thus, we conclude that no unconstitutional taking has been demonstrated.

V.

Appellants' miscellaneous points are without merit. DHCR has complied with the State Administrative Procedure Act: appellants do not dispute that DHCR filed the proposed regulations with the Secretary of State, submitted a notice of adoption for publication in the State Register, issued appropriate regulatory impact statements and other analyses and held a public hearing (see, State Administrative Procedure Act §§ 202, 202-a). Nor do we agree that the regulations are impermissibly vague. The factors to be considered in determining the existence of a qualifying relationship are objective, detailed and specific, and provide ample guidance in identifying the commencement of the relationship despite the absence of a marriage certificate or other legal document. Appellants' remaining contentions are without merit.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

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[4] As we noted in Seawall (74 NY2d at 107, n 6), examination of the owners' "reasonable investment-backed expectations" (see, Lucas, 550 US at ____ [112 S ct at 2895 n 8]; Penn Cent. Transp. Co. v New York City, 438 US 104, 124) is not relevant to a facial challenge involving a per se regulatory taking. Were we to examine appellants' expectations in assessing their broader facial challenge, we would conclude in any event that frustration of their asserted "expectation"--that the class of persons entitled to noneviction protection would not be enlarged--is insufficient to satisfy their burden in establishing a taking (see, Penn Cent., 438 US at 136; see also, Manheim, Tenant Eviction Protection and the Takings Clause, 1989 Wisc L Rev at 971).

APPENDIX A

[Opinion And Order of New York Court of Appeals 1993]

#259 - Rent Stabilization
of NYC v. Higgins

BELLACOSA, J. (concurring):

Chief Judge Kaye's Opinion of the Court cogently distinguishes respondents' regulations, challenged on this record, from the respective constitutional limitations on governmental actions found to have been violated in Boreali v Axelrod (71 NY2d 1) and Seawall Assocs. v City of New York (74 NY2d 92, cert denied 493 US 976). I therefore concur and join fully in her Opinion. Because I perceive significant practical and governance concerns that merit close attention as an outgrowth of this decision, I add these observations.

In the distribution and delegation of governmental powers, it is quite momentous that any administrative agency should possess the potent public policy power to extend the durational and relational sweep of the plurality rationale of Braschi v Stahl Assocs. Co. (74 NY2d 201), including fully into the rent stabilization category and more widely than was allowed even in the rent control field of that case. The case-by-case application of this judicially-approved regulatory initiative adds layers of great sensitivity and breadth to the implementation of this case. However high-purposed, well-intentioned and possessed of special expertise respondents' agency is, the societal equation is delicately weighted with practical, legal and fiscal consequences on all sides. Thus, while I also agree with the chief Judge's acknowledgement of the primacy of legislative choices in the field (Majority opn, at 17), I believe it useful to go farther and urge the Legislature to carefully assess the sweeping power it impliedly invested in this administrative agency in the execution of a unique human sheltering mission.

In a similar cautionary frame of thought with respect to ensuing judicial branch responsibilities, I also believe that as-applied controversies under the challenged regulations, in contradistinction to the facial challenge of this case, will be profound (Seawall Assocs. v City of New York, 74 NY2d 92, supra). Diminution of alienation and value of affected properties, examined under an as-applied microscope, are bound to seriously affect many people, landlords and tenants alike, and the availability of sufficient, appropriate and affordable dwelling places. It would seem that as-applied challenges will inevitably compel courts to examine tenancy sequences in potentially long and somewhat indefinite time lines and relationships. This will be complicated by the substantial administrative, quasi-adjudicative tasks necessarily implicated. It is virtually certain that long, successive successorships to rent stabilized leaseholds will not be just theoretical possibilities because, markets being markets, they are likely to bloom as perennials, becoming functionally transformed into perpetual stakeholds. The Legislature should satisfy itself, as the courts will have to, that unwarranted de facto results from administrative quasi-judicial determinations do not constitute the functional equivalent of divestitures from landowners of reversionary rights to their properties without just compensation and due process.

* *

Order affirmed, with costs. Opinion by Chief Judge Kaye. Judges Simons, Titone, Hancock, Bellacosa and Levine concur, Judge Bellacosa in a separate opinion. Judge Smith took no part.

Decided December 21, 1993

Appendix B - Decision And Order of Affirmance of The Appellate Division, First Judicial Department, Dated January 12, 1993 (189 A.D. 2d 594) [Pages 18a - 19a]

APPELLATE DIVISION, SUPREME COURT
FIRST DEPARTMENT

January 12, 1993

The Court announces the following decisions:

Murphy P.J., Ellerin, Kupferman, Kassal, Rubin, JJ.

47228 -
47230 Rent Stabilization Association of New York City, Inc., et al.,
Plaintiffs-Appellants,

-and-

Small Property Owners of New York,
Plaintiff-Intervenor-Appellant,

-against-

Richard L. Higgins, etc.,
Defendant-Respondent,

-and-

Robert Wells, et al.,
Defendants-Intervenors-Respondents.

Judgment of the Supreme Court, New York County (Irma Vidal Santaella, J.), entered November 27, 1991, declaring "family member" succession rights regulations promulgated by respondent to be a valid exercise of its

administrative power, unanimously affirmed, without costs.

The regulations in question are valid for the reasons set forth in this Court's opinion on the application for a preliminary injunction (164 AD2d 283). Even under the heightened scrutiny applicable to regulatory takings, the regulations substantially advance a legitimate governmental interest (see, Nollan v California Coastal Commn., 483 US 825, 834).

Subsequent decisions in Lucas v South Carolina Coastal Council (___ US ___, 112 S Ct 2886) and Yee v City of Escondido (___ US ___, 112 S Ct 1522) do not, in this instance, warrant a departure from our prior conclusion that plaintiffs' challenge to the administrative regulations lacks merit (see, Hanover Ins. Co. v D & W Central Station Alarm Co., 164 AD2d 112, 115).

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

ENTERED: January 12, 1993

s/_____

C.O.W.

Deputy Clerk

Appendix C - Decision And Order of The Appellate Division, First Judicial Department, Entered December 4, 1990 (164 A.D.2d 283) [Pages 20a - 37a]

Supreme Court of The State of New York

APPELLATE DIVISION - FIRST JUDICIAL DEPARTMENT

RENT STABILIZATION ASSOCIATION OF NEW YORK, INC., et al., Respondent, and SMALL PROPERTY OWNERS OF NEW YORK, Intervenor-Respondent, v RICHARD L. HIGGINS, as Commissioner of the New York State Division of Housing and Community Renewal, Appellant, and ROBERT WELLS et al., Intervenors-Appellants.

RENT STABILIZATION ASSOCIATION OF NEW YORK, INC., et al., Appellants, and SMALL PROPERTY OWNERS OF NEW YORK, Intervenor, v RICHARD L. HIGGINS, as Commissioner of the New York State Division of Housing and Community Renewal, Respondent, and ROBERT WELLS et al., Intervenors-Respondents.

First Department, December 4, 1990

OPINION OF THE COURT

Ross, J. P.

The primary issue on these appeals is whether the IAS court properly enjoined the implementation of the

emergency rule and subsequent amendment to the State Division of Housing and Community Renewal's permanent regulations, adopted in order to conform and/or broaden the administrative regulations governing lease succession rights and antieviction protections, under the State and City of New York rent control and rent stabilization systems, in accordance with the Court of Appeals decision in *Braschi v Stahl Assocs. Co.* (74 NY2d 201).

In *Braschi v Stahl Assocs. Co. (supra)*, the court held that the term "family" as used in section 2204.6 (d) of the New York City Rent and Eviction Regulations (9 NYCRR 2204.6 [d]), includes "two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence" (74 NY2d, at 211). On November 9, 1989, the State Division of Housing and Community Renewal (DHCR) began the process of amending the four sets of administrative regulations under its administration,[1] to provide for leasehold succession rights in accordance with the broad definition of the term "family" set out in *Braschi v Stahl Assoc. Co. (supra)* by promulgating an emergency rule applicable to all four sets of regulations. The emergency rule broadened the definition of family members entitled to succession rights to include, in addition to those traditional relations previously named, those individuals residing in the housing accommodation, with the tenant of record, as a

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[1] (1) The State Rent and Eviction Regulations (9 NYCRR parts 2100-2109 [rent control outside of New York City]); (2) the New York City Rent and Eviction Regulations (9 NYCRR parts 2200-2210 [rent control within New York City]); (3) the Emergency Tenant Protection Regulations (9 NYCRR parts 2500-2510 [rent stabilization outside New York City]); (4) the Rent Stabilization Code (9 NYCRR parts 2520-2530 [rent stabilization within New York City]); *see*, McKinney's Uncons Laws of NY, Book 65 (§§ 8581-8700).

primary residence, who can prove emotional and financial commitment and interdependence between themselves and the tenant of record. The rule lists the following eight factors to be considered in determining whether the requisite emotional and financial commitment and interdependence existed: length of relationship; sharing of expenses; intermingling of finances; engaging in family-type activities; formalization of legal obligations and responsibilities between the two parties; holding themselves out as family members through words or acts; regular performance of family functions; and any other pattern of behavior which evidences the intention of creating a long-term, emotionally committed relationship. Whereas, prior rent stabilization regulations provided for succession either, where the family member of the named tenant has resided in the housing accommodation as a primary resident from the inception of the tenancy or commencement of the relationship, and the named tenant vacates the premises (Rent Stabilization Code [9 NYCRR] § 2523.5 [b][1]) or, where a family member has resided with such tenant in the housing accommodation as a primary resident for a period of no less than two years immediately prior to the death of the tenant (9 NYCRR 2523.5 [b] [2]),[2] the emergency rule eliminated the distinction between the tenant of record's death and the tenant of record's departure. In either case,

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[2] The above-cited regulations were enacted in May 1987 in order to conform the Rent Stabilization Law to the Rent Control Law, which prohibited the eviction of an occupant of a rent-controlled housing accommodation who had been living with the tenant, and was either a surviving spouse or some other member of the deceased tenant's family. (State Rent and Eviction Regulations § 56 [4], renum 9 NYCRR 2104.6 [d].) The rent control regulations for the City of New York contained the same provision (9 NYCRR 2204.6 [d]). This court upheld the rent stabilization regulations concerning succession rights in *Festa v Leshen* (145 AD2d 49).

APPENDIX C
[Decision And Order of App. Div. 1st Dep't 1990]

the family member would succeed to the rights of the tenant of record upon the tenant of record's permanent vacatur of the housing accommodation provided the family member resided with the tenant of record as a primary resident, either for not less than two years (one year in the case of senior citizens [62 years or older] and disabled persons) or from the inception of the tenancy or commencement of the relationship (if the tenancy or relationship were less than two years, or one year old, as the case may be).

Plaintiffs commenced the within declaratory judgment action seeking a declaration that the emergency rule is null and void, ultra vires and unconstitutional, as a taking of property without just compensation. The complaint also alleges that the rule violated Real Property Law § 226-b which regulates the assignment of leases; Real Property Law § 235-f which creates a right of occupancy but not leasehold rights for roommates; Domestic Relations Law § 11 which sets out the requirements and means for the solemnization of a marriage; and the administrative limitations in the Omnibus Housing Act of 1983, and the Sate Administrative Procedure Act.

By order to show cause dated November 13, 1989, plaintiffs moved in Supreme Court, Albany County, for a preliminary injunction enjoining the implementation of the emergency rule. An order to show cause was granted, which restrained the DHCR from "implementing or effectuating said Emergency Rule, or in any other manner promulgating, issuing, implementing or effectuating the terms, conditions or requirements thereof," but made the motion returnable in Supreme Court, New York County.

On November 15, 1989, counsel for the plaintiffs and the DHCR entered into a stipulation which provided that the November 13, 1989 order to show cause would not be construed to preclude the DHCR from taking ministerial

actions necessary to comply with the procedures required for the promulgation of the regulatory amendments, which are the subject of this action, such as the filing of required regulatory impact statements and regulatory flexibility analyses with the Secretary of State. On December 13, 1989, the New York County IAS court heard argument, and again extended the TRO pending determination of the preliminary injunction motion. During oral argument on the motion, the court was informed that the DHCR was in the process of promulgating permanent regulations and had already sent out notices that a public hearing was scheduled for January 22, 1990.

On February 7, 1990, the DHCR filed with the Secretary of State for a 60-day extension of the emergency rule, and on March 20, 1990 the DHCR filed permanent regulations with the Secretary of State, identical in substance to the emergency rule. Plaintiffs, by order to show cause, moved for a preliminary injunction enjoining the implementation of the permanent regulation on the same grounds used to attack the emergency regulation, and for leave to file a supplemental complaint to assert causes of action against the permanent regulations. Plaintiffs also served a demand for compliance with CPLR 5104, claiming that the promulgation of the permanent regulations violated the original TRO.

In the interim, on March 19, 1990 the defendant-intervenors moved by order to show cause to vacate the TRO on the ground that this court's March 13, 1990 decision in *East 10th St. Assocs. v Estate of Goldstein* (154 AD2d 142) established conclusively the lack of plaintiff's likelihood of success on the merits. In *East 10th St. Assocs. v Estate of Goldstein (supra)*, this court held that the extended definition of "family" set out in *Braschi v Stahl Assocs. Co. (supra)* and applied therein to a rent-controlled apartment, also controlled in the case of a rent-stabilized

apartment in New York City, since "there is no significant distinction between the two regulatory schemes which would mandate a different definition of [the term] 'Family'" (*East 10th St. Assocs. v Estate of Goldstein, supra,* at 145).

[1] On April 4, 1990, the permanent regulations were published effective immediately. The IAS court, in an order entered April 10, 1990, provided that the TRO imposed by the Supreme Court, Albany County, on November 13, 1989 was extended to cover the permanent regulations, pending the court's determination of the plaintiff's motion for a preliminary injunction. The DHCR appealed. Plaintiffs moved in this court for an order dismissing the appeal from the April 20, 1990 order on the ground that it was a nonappeable temporary restraining order. Alternatively, plaintiffs sought to vacate the CPLR 5519 (a)(1) stay. By order entered May 15, 1990 this court, *sua sponte*, deemed the order entered April 20, 1990 as one which granted a preliminary injunction, and provided that the statutory stay would be vacated unless the appeal was perfected for the October 1990 term of this court. The Plaintiffs' challenge to the regulations is based to a large extent, upon their contentions that the promulgation of the challenged regulations is beyond the scope of the DCHR's rule-making authority, and that the regulations are contrary to the expressed legislative intention and policy, in the areas of lease succession rights, and domestic relations.[3] We disagree.

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[3] We have a most unusual situation in that at least 10 briefs (4 of them by *amicus curiae*) have been submitted with reference to the merits of the permanent regulations, as well as four briefs with reference to the question of contempt, where the IAS court is yet to write a single sentence on either issue. Nevertheless, we must accept appeal No. 1 (rather than dismiss same), as in our previous denial of plaintiffs' motion to dismiss that appeal, we *sua sponte* deemed that appeal to be from a grant of a preliminary injunction, which was the eventual result of repeated extensions of the TRO.

APPENDIX C

[Decision And Order of App. Div. 1st Dep't 1990]

For the following reasons, we reverse the order entered April 20, 1990, and vacate the preliminary injunction enjoining the implementation of the permanent regulations, and decline to review the denial of the order to show cause seeking to hold the respondent Commissioner in contempt.

Fundamental to a party's entitlement to a preliminary injunction is a demonstration that the party has a likelihood of success on the merits. (*Grant Co. v Srogi*, 52 NY2d 496, 517.) We are guided here, as we were in *Festa v Leshen* (145 AD2d 49, 55), by the standard of judicial review set forth in *Ostrer v Schenck* (41 NY2d 782, 786): "The function of a reviewing court is a limited one. The challenger of a regulation must establish that the regulation 'is so lacking in reason for its promulgation that it is essentially arbitrary.'" As this court has recognized in the past, an administrative agency may not, in the exercise of its rule-making authority, promulgate a regulation out of harmony with the plain meaning of statutory language. (*Festa v Leshen, supra,* at 55; *see, Matter of Lower Manhattan Loft Tenants v New York City Loft Bd.*, 104 AD2d 223, 225, *affd* 66 NY2d 298; *see also, Finger Lakes Racing Assn. v New York State Racing & Wagering Bd.*, 45 NY2d 471, 480-481; *Matter of Jones v Berman*, 37 NY2d 42, 53.) "Similarly, an agency may not, in excess of its lawfully delegated authority, promulgate rules and regulations for application to situations not within the intendment of the statute." (*Festa v Leshen, supra,* at 55; *see Boreali v Axelrod*, 72 NY2d 1; *Matter of Trump-Equitable Fifth Ave. Co. v Gliedman*, 57 NY2d 588, 595.)

This Court has specifically stated that the succession provisions to which the challenged regulations were added are "'remedial in nature'" and "'should be liberally construed to carry out the reform intended and spread its beneficial effects as widely as possible.'" (*Festa v Leshen,*

supra, at 56, quoting *Lesser v Park 65 Realty Corp.*, 140 AD2d 169, 173.) In *Festa v Leshen (supra*, at 56), this court held that the DHCR acted rationally and within the scope of its lawfully delegated authority in promulgating the Rent Stabilization Code amendments, which provided that relatives who reside with the named tenant may succeed to the tenant's lease rights, upon the tenant's death or abandonment of the dwelling. It was therein noted that the DHCR was delegated the authority, by the Legislature, to amend the Rent Stabilization Code and to adopt a code which, in general, protects tenants and the public interest (*supra*, 145 AD2d, at 56). We specifically found that the regulations challenged in *Festa v Leshen (supra)* were enacted in a legitimate exercise of its authority, in order to avoid a "grievous harm" to the family members of the tenants of record, in rent-stabilized apartments, who die or abandon the family dwelling. We stated: "The challenged regulations reflect DHCR's measured response to the *Sullivan* decision (66 NY2d 489, *supra*), which had the potential to expose spouses and children to summary eviction with little or no hope of finding affordable housing in New York City. Such a situation surely posed at least as serious as threat 'to the public health, safety and general welfare' (Administrative Code § YY51-1.0) as the eviction of the named tenant with whom they resided. The succession provisions adopted by DHCR, designed to prevent just such a situation, thus effectively advanced the purposes for which the Rent Stabilization Law was enacted. Indeed, as this court recognized in *Lesser v Park 65 Realty Corp. (supra*, 140 AD2d, at 173), the succession provisions 'were included in the new Code to prevent the grievous harm that would ensue from the wholesale eviction of family members which would otherwise be permitted under the law as set forth in the *Sullivan* decision *(supra)* and to address the inadequacies in this area of the law in light of its history.'"

(145 AD2d, at 56-57.)

In *Braschi v Stahl Assocs. Co. (supra)*, the Court of Appeals extended the same noneviction protection already afforded spouses and members of the named tenant's "family" under the New York City Rent and Eviction Regulations to "two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence." (*Braschi v Stahl Assocs. Co., supra*, at 211.) In *East 10th St. Assocs. v Estate of Goldstein* (154 AD2d 142, *supra*), this court found the *Braschi* decision *(supra)* to be controlling precedent which required that the *Braschi* definition of family be applied in rent stabilization cases. Apart from the fact that rent stabilization is generally acknowledged as a "less onerous" system than rent control (*Sullivan v Brevard Assocs.*, 66 NY2d 489, 494), this court noted that "there is no significant distinction between the two regulatory schemes which would mandate a different definition of 'family'" (154 AD2d, at 145). We noted as well that the court in *Braschi (supra)* specifically placed its statement expanding the definition of the word "family", " '[i]n the context of eviction '", *not* 'in the context of evicition from a rent controlled apartment '". (154 AD2d, at 145.) We then concluded that "[i]t would be anomalous to hold that a life partner could be a valid family member for the purpose of protection from eviction from a rent-controlled apartment but not a valid family member insofar as eviction from a rent-stabilized apartment is concerned" (*supra*, at 145).

Inasmuch as the challenged regulations represent a codification of the Court of Appeals decision in *Braschi v Stahl Assocs. Co. (supra)* and of this court's decision in *East 10th St. Assocs. v Estate of Goldstein (supra)* and are a response to substantially the same public needs as the succession provisions approved in *Festa v Leshen (supra)*, there is little likelihood that plaintiffs will succeed on the

merits of their challenge to the regulations on the grounds that their promulgation violates the policy of the statute which created the DHCR and exceeds the delegated authority of the agency. It is clear also that plaintiffs' challenge based upon the provision of the Omnibus Housing Act of 1983 (L 1983, ch 403, § 9) which provides that no provision of the Rent Stabilization Code "shall impair or diminish any right or remedy granted to any party by this law or any other provision of law" will not ultimately succeed.

[2] This court in *Festa v Leshen (supra*, at 60-61) held that the provision was not a bar to the creation of succession rights for traditional family members. We stated that the fact '[t]hat no statute or regulation had previously restricted the contractual rights of landlords to evict the family members of a tenant who had died or vacated rent-stabilized premises does not constitute the granting of a right. Rights are not conferred by the absence of a regulation." (145 AD2d, at 61.) We further noted that "by delegating to DHCR the authority to adopt an amendment to the Code which 'protects tenants and the public interest' (Administrative Code § 26-511[c][1], formerly § YY51-6.0 [c][1]), the Legislature clearly provided the agency with a broad mandate, which would inevitably require some changes in the legal relationship between landlords and tenants. The statutory proscription against the impairment of existing rights was intended to assure that any such changes be not inconsistent with the Rent Stabilization Law or any other law." (*Festa v Leshen, supra*, at 61.) As with the succession provisions at issue in *Festa v Leshen (supra)* the challenged provisions satisfy this requirement. By responding to the continuing shortage of low- and middle-income housing units available, the rise in instances of individuals "doubling up" and tenants being forced into a homeless situation due to unaffordable rents, the regulations clearly

comport with the broad mandate provided the DHCR by the Legislature to "protect * * * tenants and the public interest". Since the new regulations incorporate the *Braschi* definition of "family" into the existing regulatory scheme, they do not conflict with Real Property Law § 226-b, which governs the assignment of leases, or with Real Property Law § 235-f (2), which makes it "unlawful for a landlord to restrict occupancy of residential premises, by express lease terms or otherwise, to a tenant or tenants or to such tenants and immediate family". The regulations deal with succession to leasehold rights, and with "family members" whether or not related by blood or law who have always treated the apartment as their family home, as opposed to "roommates". In *Braschi v Stahl Assocs. Co. (supra*, at 212) the court noted that the approach mandated by its decision would "foster the transition from rent control to rent stabilization by drawing a distinction between those individuals who are, in fact, genuine family members, and those who are mere roommates (*see*, Real Property Law § 235-f; *Yorkshire Towers Co. v Harpster*, 134 Misc 2d 384) or newly discovered relatives hoping to inherit the rent-controlled apartment after the existing tenant's death."

[3] The argument that the regulations conflict with Domestic Relations Law § 11 requiring solemnization of a marriage is meritless, as the regulations do not remotely attempt to equate the special relationship defined therein as spousal, and specifically distinguish "husband" and "wife" from that relationship. The regulations do not attempt to confer any other protection or privilege than the protection from eviction upon the death or departure of the tenant of record.

Plaintiffs broadly contend that promulgation of the permanent regulation violates the doctrine of separation of powers, arguing that the DHCR overstepped the boundary of proper administrative rule making and entered the realm

of legislative policy making. The basis for plaintiffs' claim is that since 1986 there have been approximately 27 bills introduced in the State Legislature concerning succession by "family members" and individuals "residing with" the tenant of record to the tenant's lease rights in rent-regulated apartments, non of which were passed. Plaintiffs view the presentation and debate of such bills without the passage of any legislation as a tacit pronouncement of policy by the Legislature on the subject covered by the challenged regulations. Plaintiffs submit no authority for such argument.

[4] While the line between administrative rule making and legislative policy making has been described as difficult to define in some cases (*Boreali v Axelrod*, 71 NY2d 1, 11), such is not the case here. The court in *Boreali* invalidated a comprehensive Public Health Council (PHC) code regulating tobacco smoking in areas open to the public, finding on the basis of four "coalescing circumstances" that the "difficult-to-define line between administrative rule-making and legislative policy-making has been transgressed" (*supra*, 71 NY2d, at 11) in that the regulations were enacted without legislative guidance in an area, where the Legislature had tried and failed to reach an agreement, and were riddled with exceptions based solely on economic and social concerns. By contrast, the regulations herein were enacted in response to the pronouncements of the Court of Appeals, in an area within the particular expertise of the agency and do not contain any exceptions but, rather, uniformly advance the policies of the regulatory scheme according to the mandate given the agency by the Legislature.

Plaintiffs, for the first time on appeal, argue that the permanent regulations are impermissibly vague because they provide no criteria for determining when a nontraditional relationship commences. The standards for evaluating

vagueness were enunciated in *Grayned v City of Rockford* (408 US 104, 108-109): "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application".

These standards however, are not to be applied mechanically. "The degree of vagueness that the Constitution tolerates - as well as the relative importance of fair notice and fair enforcement - depends in part on the nature of the enactment. Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow" (*Hoffman Estates v Flipside, Hoffman Estates*, 455 US 489, 498).

[5] Here, the challenged regulations set out eight specified factors to be employed in determining whether a family relationship exists. These factors are sufficiently definite to give a person of "ordinary intelligence" a "reasonable opportunity" to make that determination. The question of when such a relationship commences is, contrary to plaintiffs' view, a relatively straightforward factual one, which can be determined in terms of those same eight factors. Aspects of the relationship from the date intermingling and joint ownership of assets began, to when the two individuals began a close relationship with each other's relatives can be examined to determine when the "family relationship" truly commenced. To the extent that

the regulations codify the *Braschi* decision they draw "a distinction between those individuals who are, in fact, genuine family members, and those who are mere roommates * * * or newly discovered relatives hoping to inherit the rent-controlled [or rent-stabilized] apartment after the existing tenant's death [or departure]" (*see, Braschi v Stahl Assocs. Co., supra*, at 212), and provide definite means with which to draw that distinction.[4]

Plaintiffs advance various constitutional challenges to the regulations all based on the contention that the regulations effect unconstitutional physical and/or regulatory takings which effectively deprive the landlord of the use of the property indefinitely, without just compensation. Plaintiffs argue that the regulations violate the constitutional guarantee against the taking of private property for public use without just compensation by "removing all control from the landlord and placing permanent occupancy, dominion and control over the landlord's property with the tenant". This conclusion is based upon the plaintiffs' view that the regulations permit "permanent and multi-generational occupancy by strangers."

[6] The New York State Court of Appeals and the United States Supreme Court have upheld rent-control and similar regulation of housing conditions and other aspects of the landlord-tenant relationship (*see, Bowles v Willingham*, 321 US 503, 517-518; *Loab Estates v Druhe*, 300 NY 176, 180; *Levy Leasing Co. v Siegel*, 258 US 242; *Block v Hirsh*, 256 US 135). The challenged regulations do not

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[4] The argument advanced by plaintiffs that there is no basis upon which to protect family members of tenants of record who abandon the apartment rather than die is meritless. *Matter of Herzog v Joy*, (53 NY2d 821, *affg* 74 AD2d 372), *Festa v Leshen (supra)* and *Braschi (supra)* make clear that the distinction between death and abandonment of the premises by the tenant of record, has itself been abandoned by the counts.

fundamentally change the nature of the rent control and rent stabilizations systems so as to authorize "the permanent occupation of the landlord's property by a third party" of the sort, which traditionally, has been held to be a "taking" (*see, Loretto v Teleprompter Manhattan CATV Corp.*, 458 US 419, 440, 441). These regulations expand the definition of those individuals entitled to succeed to the tenant-of-record's lease rights by virtue of their familial relationship with the tenant. Like rent control and other regulations that have been upheld by this court, the Court of Appeals and the United States Supreme Court, the regulations herein involve "restrictions imposed on existing tenancies where the landlords had voluntarily put their properties to use for residential housing" (*see, Seawall Assocs. v City of New York*, 74 NY2d 92, 105, *cert denied* ___ US ___, 110 S Ct 500). Thus they are to be distinguished from the regulations at issue in *Seawall Assocs. v City of New York (supra)* which were found by the Court of Appeals to force owners to subject their properties to a use which they neither planned nor desired (*Seawall Assocs. v City of New York, supra*, at 105),[5] and to offer their properties for rent as SRO units to persons with whom they had no existing landlord-tenant relationship. The plaintiffs' fear that the nature of the nontraditional relationship, as defined in the regulations, will permit "permanent and multi-generational occupancy by strangers" is an unfounded one, apparently based, in part at least, on the assumption that the regulations allow room for fraud. The permanency of the occupancy by the nontraditional family member is no

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[5] The statute struck down by the Court of Appeals in *Seawall (supra)* imposed a moratorium on the demolition or conversion of structures containing SRO (single-room occupancy) units and required owners of SRO properties to rehabilitate all vacant units and offer them for rent. The statute imposed substantial monetary penalties for noncompliance.

greater than that of a traditional family member. Moreover, the definition of the relationship provided in the regulation is not so nonspecific or general as to allow for abuse. The successors to the tenant's lease rights must demonstrate a close, "familial" connection to the tenant and to the apartment. Thus such individuals are not mere "third-parties" or "strangers" to the tenancy.

Plaintiffs argument that the regulations effect an uncompensated regulatory taking is based upon the contention that the broadening of the definition of those entitled to succession rights denies the landlords the economically viable use of the properties, by effectively extinguishing the landlords expectation of a residual or reversionary interest in the apartments. According to the plaintiffs this results because the regulations permit succession to a broad indefinite class of people predicated upon two years of occupancy or even less. As has already been discussed in connection with the "vagueness" argument advanced by the plaintiffs, it is clear that the regulations specifically define a narrow class of individuals who are entitled to succession.

The regulations here at issue are distinguishable from those involved in *520 E. 81st St. Assocs. v Lenox Hill Hosp.* (157 AD2d 138, *appeal withdrawn* 76 NY2d 851). In *520 E. 81st St. Assocs. v Lenox Hill Hosp. (supra)*, the regulations at issue provided an exception to the nonprimary residence exemption in the Rent Stabilization Law where a not-for-profit hospital is the lease's named tenant (L 1984, ch 940). This court found that because Lenox Hill Hospital had been in existence since June 29, 1918, and showed no signs of ceasing operations, the landlord was "effectively precluded from regaining possession of its property" primarily because Lenox Hill could use the apartments as a dormitory "in perpetuity" (*supra*, at 146, 147). Moreover this court found that by providing the

hospital with virtual fee interest in the property, the regulations as applied would increase "the dislocation of long-term tenants, thereby contravening the purpose of rent stabilization, by requiring Lenox Hill to remove long-term occupants if they terminate their employment with it" (*supra*, at 149). We stated that the policy of promoting better health care should not be "furthered by interpretating the Rent Stabilization Law so as to exacerbate the very housing emergency which rent stabilization was enacted to address" (*supra*, at 150).

The occupancy herein is necessarily limited by the lifetime of the succeeding "family member", which is no greater than that of any other traditional relation entitled to succession prior to *Braschi* (*supra*). The possession and use of the property in perpetuity is simply not a potential result herein. The landlord is not required to issue renewal leases to an institution with perpetual existence, but rather to natural persons, whose primary residence was already in the landlord's building. The plaintiffs have not shown that they will be able to demonstrate that the regulations prevent them from obtaining a reasonable return on their property. Moreover, unlike the regulations in 520 E. 81st St. Assocs. (*supra*) the regulations here at issue advance the intended purposes of the rent stabilization and rent control succession provisions - to prevent the eviction of individuals with substantial ties to their home-apartment and to the former tenant of record. Thus, since the plaintiffs will not be able to demonstrate that the regulations do not substantially advance a legitimate State interest or that they deny landlords economically viable use of their property (*see, Seawall Assocs. v City of New York, supra*, at 107), plaintiffs' challenge based upon the theory that the regulations constitute a regulatory taking will also necessarily fail.

Plaintiffs, though they have strenuously and

competently argued, have failed to demonstrate that they have a likelihood to succeed on the merits, in their challenge to the regulations. They are, therefore, not entitled to the injunctive relief that they were granted below (*Grant Co. v Srogi*, 52 NY2d 496, *supra*).

Accordingly, the order of Supreme Court, New York County (Irma Vidal Santaella, J.), entered April 20, 1990, and deemed as one granting a preliminary injunction, is reversed, on the law, the facts and in the exercise of discretion, and the injunction vacated, with costs. We decline to reach the plaintiffs' appeal from the order, entered April 10, 1990, which denied their application for an order holding the defendant Commissioner in contempt for allegedly violating the original temporary restraining order made with respect to the emergency rule, and dismiss that appeal as moot, without costs.

MILONAS, ASCH AND ELLERIN, JJ., concur.

Order, Supreme Court, New York County, entered April 20, 1990, reversed, on the law, the facts and in the exercise of discretion, and the injunction vacated, with costs. Appeal from order of said court entered on April 10, 1990, is dismissed as moot, without costs.

Appendix D - Decision And Final Judgment of The Supreme Court of The State of New York, County of New York, by Santaella, J., Entered November 27, 1991 [Pages 38a - 46a]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

RENT STABILIZATION ASSOCIATION OF NEW YORK CITY, INC., THE DELANO VILLAGE COMPANIES, RIVERDALE GARDENS and COLISEUM PARK APARTMENTS CO.,	Index No. 24480/89
Plaintiffs,	
- and -	
SMALL PROPERTY OWNERS OF NEW YORK,	
Plaintiff-Intervenor,	
-against-	
RICHARD L. HIGGINS, Commissioner of the New York State Division of Housing and Community Renewal,	
Defendant,	
-and-	
ROBERT WELLS, et al.,	
Defendant-Intervenors.	

IRMA VIDAL SANTAELLA, J.:

APPENDIX D

[Decision And Final Judgment of NYS Sup. Ct. 1991]

Plaintiffs, including the Rent Stabilization Association of New York City, Inc. (RSA), the Delano Village Companies (Delano), Riverdale Gardens (Riverdale), and Coliseum Park Apartments Co. (Coliseum) owners (or operators) of housing accommodations subject to the Rent Stabilization Law and Code, move for summary judgment pursuant to CPLR 3212 in this declaratory judgment action by which they are challenging the promulgation of certain temporary and permanent amendments by defendant Higgins (succeeded by Aponte) as Commissioner of the New York State Division of Housing and Community Renewal (DHCR) as illegal, ultra vires, and unconstitutional, inter alia.

Defendant Aponte (DHCR) cross-moves for summary judgment pursuant to CPLR 3212 upon the verified supplemental complaint. Cross-motions for summary judgment have also been made by defendant-intervenors (Disabled in Action, Kairos Rencher, Janet Goodman, Gay Men's Health Crisis, Inc., Robert Wells and Everett Quinton). Brooklyn Office for the Aging also moves for summary judgment in its favor.

Plaintiffs in the verified supplemental complaint allege that DHCR promulgated emergency rules on November 8, 1989 amending the Rent Stabilization Code, the Emergency Tenant Protection Regulations, the New York City Rent and Eviction Regulations and the New York State Rent and Eviction Regulations.

The emergency rules were replaced by permanent amendments on March 20, 1990.

The parties' dispute centers around the regulation (9 NYCRR 2520.b[3]) which includes an expanded definition of "family" from the traditional meaning following the

decision of the New York Court of Appeals in **Braschi v Stahl Associates Company** (74 N.Y.2d 201), decided July 6, 1989. Braschi had shared a rent controlled apartment with Blanchard, for a number of years when the latter died and the landlord sought to evict Braschi as a licensee. Upon his motion for a preliminary injunction, the Supreme Court found entitlement to protection of the New York City Rent and Eviction Regulations (9 NYCRR 2204.6[d]), that Braschi was a family member within the regulations and granted preliminary injunctive relief. The Appellate Division, reversing, granted leave to appeal to the Court of Appeals upon a certified question of law as to whether it had properly reversed. The Court of Appeals reversed, stating that Braschi had not failed as a matter of law in showing a clear likelihood of ultimate success on the merits. The two men had been permanent life partners for years, had held themselves out socially to friends and family, had shared a household budget and maintained joint bank accounts and credit cards, inter alia. Braschi was the beneficiary of the deceased tenant's insurance policy and legatee and executor of his estate. A likelihood of success on the merits was found, Braschi was not simply a roommate and was entitled to noneviction protection.

The contested regulation, 9 NYCRR 2520.6(o) herein which tracks the language of Braschi is as follows:

> (o) Family member. (1) A husband, wife, son, daughter, stepson, stepdaughter, father, mother, stepfather, brother, sister, nephew, niece, uncle, aunt, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-law or daughter-in-law of the tenant or permanent tenant; or
>
> (2) Any other person residing with the tenant or permanent tenant in the housing

accommodation as a primary or principal residence, respectively, who can prove emotional and financial commitment, and interdependence between such person and the tenant or permanent tenant. Although no single factor shall be solely determinative, evidence which is to be considered in determining whether such emotional and financial commitment and interdependence existed, may include, without limitation, such factors as listed below. In no event would evidence of a sexual relationship between such persons be required or considered:

(i) longevity of the relationship;

(ii) sharing of or relying upon each other for payment of household or family expenses, and/or other common necessities of life;

(iii) intermingling of finances as evidenced by, among other things, joint ownership of bank accounts, personal and real property, credit cards, loan obligations, sharing a household budget or purposes of receiving government benefits, etc.;

(iv) engaging in family-type activities by jointly attending family functions, holidays and celebrations, social and recreational activities, etc.;

(v) formalizing of legal obligations, intentions and responsibilities to each other by such means as executing wills naming each other an executor and/or beneficiary, granting each other a power of attorney and/or conferring upon each other authority to make health care decisions each for the other, entering into a personal relationship contract, making a domestic partnership declaration, or serving as a representative payee for purposes of public benefits, etc.;

(vi) holding themselves out as family members to other family members, friends, members of the community or religious

institutions, or society in general, through their words or actions;

(vii) regularly performing family functions, such as caring for each other or each other's extended family members, and/or relying upon each other for daily family services;

(viii) engaging in any other pattern of behavior, agreement or other action which evidences the intention of creating a long-term, emotionally committed relationship.

Plaintiffs allege that the amended regulation permit persons who are not the tenants of record to acquire tenancy rights; that tenancy succession was drastically changed by the amendment from that of the May, 1987 code allowing individuals related to the tenant by blood or marriage to succeed to the tenancy if the prime tenant vacated provided the successor had occupied the premises as a primary residence from inception of the tenancy or beginning of the relationship and in the event of death or the prime tenant, the successor family member must have occupied two years prior to the death in order to receive a renewal lease; that if the prime tenant was a senior citizen or disabled then the two year period was decreased to one year.

Plaintiffs allege that DHCR had no legislative basis for making the amendments and these were an improper exercise of the administrative power of the agency, beyond the scope of its legislative mandate. Also the amendment allegedly undermines Real Property Law §§ 235-f and 226-b denying the landlord the opportunity to reasonably consent or reject the subletting. The amendment allegedly creates marital relationship which violates the Domestic Relations law and is contrary to the Omnibus Housing Act of 1983

(Laws of 1983, chp. 403). The rules were allegedly not promulgated in accordance with the State Administrative Procedures Act (SAPA), DHCR having failed to conduct a study to determine whether an emergency existed before enactment of the emergency rules.

Plaintiffs' verified supplemental complaint includes eight causes of action and differs from the original complaint (the original was concerned with the emergency rules), and the latter substitutes and/or adds the permanent amendments in the causes of action. In the first cause of action plaintiffs allege that a justiciable controversy exists and DHCR violated the Omnibus Housing Act of 1983 by diminishing plaintiff RSA's members and co-plaintiff's rights and acting without power. A declaration is sought to that effect.

The second cause of action is that the rules and amendments undermine and contravene the Real Property Law § 235-f; the third Real Property Law § 226-b; the fourth is for a declaration that defendant knowingly and intentionally violated New York law and the rules and amendments are ultra vires and void; the fifth cause of action is that the rules and amendment contravene the Domestic Relations Law and are void; the sixth, that the rules and amendments were not promulgated in accordance with SAPA; the seventh is for a declaration that the rules and amendment constitute a violation of due process under the Fifth and Fourteenth Amendments of the United States Constitution and Article 1 §§ 6 and 7 of the New York State Constitution as an unconstitutional taking since plaintiffs may not regain their property but must enter into tenant relationships with persons with whom they are not in privity; the eighth cause of action is that the promulgation

and implementation are unconstitutional since it was a taking without just compensation to plaintiffs' members.

DHCR sets forth in its answer various affirmative defenses, including lack of standing of plaintiffs to challenge the amendment outside New York City or under Rent Control (New York Rent and Evictions) Regulations; that Plaintiffs may not in New York City challenge regulations effective outside New York City; that there is no justiciable controversy and if there is, plaintiffs are not entitled to a declaration in their favor because of an Appellate Division decision of December 4, 1990 (___ A.D. 2d ___, 562 N.Y.S. 2d 962) in which plaintiffs' arguments were rejected; that plaintiffs' sixth cause of action fails to allege specifics regarding non-compliance with SAPA. DHCR alleges that the promulgation of the Regulations was within its power, not arbitrary and capricious, in violation of law or abuse of discretion. Defendant-intervenors allege in their answers affirmative defenses that plaintiffs fail to exhaust their administrative remedies, failure to state a cause of action, lack of standing, waiver of the SAPA claims.

After DHCR had promulgated the Emergency Rules on November 8, 1989 implementing **Braschi**, RSA and the other plaintiffs instituted this action, November 13, 1989, in Supreme Court, Albany County where a TRO as to the emergency rules was obtained by them. The action was moved to New York County upon DHCR's motion. Permanent amendments identical to the emergency rules were promulgated on March 20, 1990. On April 5, 1990, the plaintiffs moved by order to show cause in IAS Part 35 to hold DHCR in contempt and to extend the TRO to the permanent amendments. This court extended the TRO and on May 15, 1990 after appeal by DHCR, the Appellate

Division First Department sua sponte deemed the TRO to be a preliminary injunction against the emergency rules and the permanent injunction. On December 4, 1990, the Appellate Decision reversed the IAS (164 A.D. 2d 283), vacating the "preliminary injunction" and dismissing the contempt appeal as moot. The Appellate Division in the December 4, 1990 determination in its discussion of likelihood of success on the merits -- a prerequisite to a preliminary injunction -- disposed of each of plaintiffs' contentions, finding that they did not have a meritorious case regarding Real Property Law § 226-b, the Domestic Relations law, the constitutional arguments, etc. Further, the court stated that the definition of family set forth in **Braschi** had been extended to apply in Rent Stabilization contexts by virtue of **East 10th St. Assoc. v. Estate of Stuart Goldstein** (154 A.D. 2d 142). That case involved Robert Wells, also a defendant-intervenor in the instant manner, who had lived in a gay-life partnership with the tenant of record in a rent stabilized apartment for a number of years when the tenant died in 1987. By the extension of **Braschi**, Wells was entitled to the protections accorded traditional family members so that the landlord's petition seeking to evict him was ultimately dismissed.

CPLR 3001 provides that the Supreme Court may render a declaratory judgment having the effect of a final judgment regarding the rights and legal relations of the parties to a justiciable controversy whether or not further relief could be claimed.

There is no doubt that there is a justiciable (actual) controversy here. Courts may not render advisory opinions but are required to determine controversies between litigants (**New York Public Interest Research Group Inc. v.**

APPENDIX D

[Decision And Final Judgment of NYS Sup. Ct. 1991]

Carey, 41 N.Y. 2d 527).

In **Doe v. Axelrod,** MD (136 A.D. 2d 410, mod. on oth. grnds 73 N.Y. 2d 748), it was determined that an action for declaratory judgment was the proper vehicle and not an Article 78 proceeding where the authority of the State Commissioner of Health to put a certain regulation into effect, where validity or a legislative act is being reviewed.

This court, after a review of the extensive papers, the Appellate Division determination, among other authorities find that plaintiffs are not entitled to summary judgment in their favor. Among other things, no actual SAPA violations have been demonstrated. At best the constitutional arguments are speculative. Declaratory judgment in their favor is denied and the court renders declaratory judgment in favor of defendants that the regulations are a proper exercise of the power of DHCR. Also plaintiffs are not aggrieved by the instant determination since persons claiming entitlement under the new regulations must make a certain showing.

Accordingly, the motion by plaintiffs is denied; the cross-motion is granted.

The foregoing constitutes the decision and judgment of the court.

s/_____

J. S. C.

Dated: November 15, 1991

Norman Goodman

Clerk

FILED: November 27, 1991